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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

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BETANIA TORIBIO, Administratrix  
of the Estate of JOHN JOAQUIN  
TORIBIO, Deceased; and BETANIA  
TORIBIO, individually,  
Plaintiff

6

v.

CIVIL ACTION  
NO. 12-4975 (JEI/JS)

7

PINE HAVEN, LLC, d/b/a PINE HAVEN  
CAMPGROUND and PINE HAVEN CAMPING  
RESORT; and DIVERSIFIED INVESTMENTS,  
INC. a/k/a DIVERSIFIED INVESTMENTS,  
LLC a/k/a DIVERSIFIED INVESTMENT  
SERVICES LLC,

10

Defendants.

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UNITED STATES COURTHOUSE  
ONE JOHN F. GERRY PLAZA  
4TH AND COOPER STREETS  
CAMDEN, NEW JERSEY 08101  
MAY 12, 2015

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**B E F O R E:**

**THE HONORABLE JOSEPH E. IRENAS**  
**UNITED STATES DISTRICT JUDGE**

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**A P P E A R A N C E S:**

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MANIACI, CICCOTTA & SCHWEIZER  
BY: RENO JOHN CICCOTTA, ESQUIRE  
- and -

18

WESTMORELAND, VESPER, QUATTRONE & BEERS  
BY: TOM VESPER, ESQUIRE

19

Counsel for Plaintiff

20

LAW OFFICES OF TERKOWITZ & HERMESMANN  
BY: PATRICK J. HERMESMANN, ESQUIRE

21

Counsel for Defendant, Diversified Investments  
Pine Haven, LLC

22

23

Certified as true and correct as required by Title 28,  
U.S.C., Section 753.

24

/s/ Karen Friedlander, CRR, RMR

25

**1** W I T N E S S I N D E X

**2**

**3** WITNESS PAGE

**4** **MARIA K. BELLA** 1105

**5** VOIR DIRE EXAMINATION OF MARIA K. BELLA BY MR. 1106

**6** HERMESMANN:

**7** VOIR DIRE EXAMINATION OF MARIA K. BELLA BY MR. 1110

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**9** DIRECT EXAMINATION OF MARIA K. BELLA BY MR. 1111

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**12** REDIRECT EXAMINATION OF MARIA BELLA BY MR. 1158

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**14** RECROSS-EXAMINATION OF MARIA BELLA BY MR. VESPER: 1161

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1 (OPEN COURT, MAY 12, 2015, 8:27 a.m.)

2 THE DEPUTY CLERK: All rise.

3 (JURY ENTERS; 8:30 a.m.)

4 THE COURT: Good morning, everybody.

5 RESPONSE: Good morning, Your Honor.

6 THE COURT: What a nice time of day this is, my

7 favorite.

8 Everybody, please be seated.

9 I guess it's you.

10 MR. HERMESMANN: Defense will call Maria Bella.

11 THE DEPUTY CLERK: Good morning. Please step up.

12 Please raise your right hand.

13 (**MARIA K. BELLA**, having been duly sworn as a witness,

14 testified as follows:)

15 THE DEPUTY CLERK: Please state and spell your name

16 for the record.

17 THE WITNESS: Maria K. Bella. M-A-R-I-A, middle

18 initial K. Last name B, as in butterfly, E-L-L-A.

19 THE DEPUTY CLERK: You can be seated.

20 THE COURT: B-E-L-L-O?

21 THE WITNESS: A.

22 THE COURT: B-E-L-L-A.

23 THE WITNESS: Yes, sir.

24 THE COURT: You may proceed, sir.

25 MR. HERMESMANN: Thank you, Your Honor.

BELLA - VOIR DIRE - HERMESMANN

1 (VOIR DIRE EXAMINATION OF MARIA K. BELLA BY MR. HERMESMANN:)

2 Q. Good morning, Ms. Bella.

3 A. Good morning.

4 Q. Please make sure that, one, the microphone does amplify  
5 and try to speak to me this way. If I can hear you, I'm  
6 certain the jury can hear you, okay?

7 A. Yes, sir.

8 Q. Where did you come in from?

9 A. From Reading, Pennsylvania.

10 Q. And do you have a background in aquatic safety?

11 A. Yes, I do.

12 Q. Please take the jury through your background in aquatic  
13 safety.

14 A. This is actually my 40th year of active involvement in  
15 the aquatics industry. I started out as a swimming aide.  
16 Worked my way up to lifeguard, then swimming instructor,  
17 coached the swim team, of course, became the facility manager.  
18 Over the years, I managed a number of different types of  
19 facilities, obtained a degree in aquatic engineering, so  
20 that's specific to the design, construction, operation and  
21 maintenance of aquatic facilities.

22 I'm a certified pool operator instructor through the  
23 National Swimming Pool Foundation and a certified aquatic  
24 facility operator instructor trainer through the National  
25 Recreation Parks Association. What that means is, I teach the

BELLA - VOIR DIRE - HERMESMANN

1 teachers that teach people how to operate aquatic facilities  
2 of all different sorts and sizes, catering to individuals from  
3 toddlers through senior citizens.

4 Q. Can you take us through, somewhat briefly, your  
5 employment history in the aquatic safety field?

6 A. Certainly. I started out working for recreation  
7 departments in Colorado, moved from there to Texas. Continued  
8 to work both in the public and private sector. Another move  
9 to Pennsylvania, and again continued to work in both the  
10 public and private sector.

11 Tried to get out of the business a couple of times, but  
12 it's like that scene in the Godfather where he says, I tried  
13 to get out and they kept pulling me back in. That's truly my  
14 life in aquatics. I've had people show up my doorstep asking  
15 me to come and help them with their facility, training their  
16 swimmers, teaching their children.

17 Q. What type of aquatic facilities have you been involved  
18 with over the years?

19 A. Well, I have worked, again, in municipal settings,  
20 everything from very small therapy pools, daycare centers, up  
21 through very large Olympic-sized swimming pools. As a trainer  
22 of facility operators, I worked with people in institutional,  
23 universities, hospitality industry, hotel, motel, campgrounds,  
24 apartment complexes, you name it. If there's a recreational  
25 swimming area, I've been involved in it, both on the

BELLA - VOIR DIRE - HERMESMANN

1 operational side, the design side. I worked in commercial  
2 sales for a while, specifying equipment, reviewing designs by  
3 architects and engineers and making changes to them to make  
4 the facilities safer.

5 Q. What type of training have you provided over the years to  
6 facility operators of various bodies of water?

7 A. That training would be through the National Swimming Pool  
8 Foundation. They actually have an international program that  
9 requires classroom time, continuing education and then testing  
10 for national certification, and all through the -- also,  
11 through the National Recreation and Parks Association, they  
12 have a similar program where attendees will come for either  
13 their initial training or their continuing education in the  
14 operating of aquatic facilities, both from safety standpoint,  
15 of course, the risk management and then also cost  
16 effectiveness.

17 Q. The training that you provided to facility operators over  
18 the years, did that include facility operators that operate  
19 lakes?

20 A. Yes, sir. And again, this would be in the campground.  
21 It's usually in the campground industry, where I will get  
22 people in the class who operate swimming pools, hot tubs,  
23 lakes, everything falls under their operational umbrella.

24 In some states, such as New Jersey, they have to be  
25 certified either as a CPO, certified pool operator, or an AFO,

BELLA - VOIR DIRE - HERMESMANN

1 aquatic facility operator, or through the YMCA's pool program.

2 In other states, the requirement is not there for

3 certification, but they come voluntarily, again, looking at

4 safer operations and more cost effective operations.

5 Q. And specifically, as to lakes and campgrounds, for how

6 long a time period have you been providing such training?

7 A. The past decade.

8 Q. Do you have any professional memberships that would be

9 relevant?

10 A. I have a number of professional memberships. I'd have to

11 reference my CV. May I do so?

12 Q. Sure.

13 THE COURT: I don't --

14 MR. HERMESMANN: She has it.

15 MR. VESPER: She has her CV. She has it. No

16 objection.

17 THE COURT: All right.

18 THE WITNESS: I just need to look at the list,

19 because I forget.

20 I'm involved with ASTM International, used to be known

21 as the American Society for Testing and Materials and now it's

22 an international organization, so they've changed their name

23 slightly.

24 The Association of Pool and Spa Professionals which

25 writes all of the ANSI standards and promulgates the ANSI



BELLA - VOIR DIRE - VESPER

1 standards specific to aquatic facilities. The National  
2 Association of Amusement Ride Safety Officials, and that has  
3 to do with things like water slides, large inflatable devices  
4 of the sort at different types of aquatic facilities and  
5 amusement parks.

6 I'm a member of the National Drowning Prevention  
7 Alliance, the National Recreation and Park Association, the  
8 National Swimming Pool Foundation, the Northeast Spa and Pool  
9 Association, Professional Pool Operators of America and the  
10 World Water Park Association.

11 MR. HERMESMANN: Your Honor, at this time, we would  
12 like to offer Ms. Bella as an expert in aquatic safety.

13 THE COURT: Voir dire.

14 MR. VESPER: I have no objection. It's true, we've  
15 actually lectured before, haven't we? For ICLE, and for the  
16 state park, ICLE, the Institute for Continuing Legal  
17 Education.

18 THE WITNESS: If we have, please forgive me. I don't  
19 remember faces well. I'm so sorry.

20 MR. VESPER: That's all right.

21 (VOIR DIRE EXAMINATION OF MARIA K. BELLA BY MR. VESPER:)

22 Q. So aquatic safety, you would agree, for the ladies and  
23 gentlemen of the jury to understand this, aquatic safety  
24 includes both pools and lakes?

25 A. It includes all recreational bodies of water, so anything

BELLA - DIRECT - HERMESMANN

1 intended for recreational swimming, sir.

2 Q. Okay. So any body of water, it could be a fishing lake,

3 but if people are invited to enjoy the aquatics of whatever

4 body of water it is, that's what aquatic safety encompasses.

5 You would agree?

6 A. The areas in which I work --

7 Q. Yes.

8 A. -- are specifically the bodies of water intended for

9 swimming. So if a fishing lake were not intended for

10 swimming, not advertised and inviting swimmers, then no, that

11 would be separate from what I do.

12 Q. That falls outside of that?

13 A. Yes, sir.

14 Q. In fact, I don't know whether you skipped over it, but

15 you're one of the only four certified, what,

16 instructors/trainers that teach the teachers?

17 A. Yes, sir. In --

18 Q. In the country?

19 A. Yes, sir.

20 MR. VESPER: I have no objection.

21 THE COURT: Okay. I'm going to permit her to testify

22 as an expert witness. Go ahead.

23 MR. HERMESMANN: Thank you, Your Honor.

24 (DIRECT EXAMINATION OF MARIA K. BELLA BY MR. HERMESMANN:)

25 Q. Ms. Bella, I'm going to ask you some questions as we move

BELLA - DIRECT - HERMESMANN

1 along here that may require you to give an opinion. So please  
2 ensure that any opinions you offer is to a reasonable degree  
3 of probability in the field of aquatic safety.

4 Can you do that for us?

5 A. Yes, sir.

6 Q. At my request, did you review the matter that's before  
7 the Court involving the drowning of John Toribio on  
8 August 8th, 2010?

9 A. Yes, sir, I did.

10 Q. And briefly, tell the jury what all you reviewed relative  
11 to that request.

12 A. Again, I'm going to reference my report. It's an  
13 extensive list, so I apologize, but I'll go through this as  
14 quickly as possible.

15 I reviewed the New Jersey State Police investigation  
16 report dated August 8th, 2010; the New Jersey State Police  
17 supplemental investigation reports dated August 24th, 2010 and  
18 September 2nd, 2010; also, the New Jersey State Police  
19 evidence disposal report dated January 24th, 2013.

20 I reviewed the Complaint in this matter; plaintiff's  
21 initial disclosures and all attachments thereto; first set of  
22 Interrogatories directed to plaintiff; answers of plaintiff to  
23 the Interrogatories of the defendant; plaintiff's supplemental  
24 answers.

25 First set of Interrogatories directed to the defendant

BELLA - DIRECT - HERMESMANN

1 Pine Haven; answers from Pine Haven; initial disclosures by  
2 Pine Haven; answers by Timothy and Heather Miller; answers by  
3 Anthony Dioscon. I apologize if I'm not saying that last name  
4 correctly.

5 Third party defendants Heather Miller, Heather, also  
6 known as Heather Dioscon and Timothy Miller and Anthony  
7 Dioscon initial disclosures; John Toribio's school records,  
8 the autopsy report; the death certificate for John.

9 I reviewed photographs from the medical examiner's  
10 office; photographs of Pine Haven campground dated  
11 December 6th, 2010; the transcript of the July 15th, 2013  
12 deposition of Ms. Toribio; the transcript of the July 1st,  
13 2013 deposition of Timothy Miller and the exhibits thereto.

14 I listened to the recorded statement taken by the  
15 police of Anthony Dioscon and Michelle Wheeler following the  
16 incident. I performed a site inspection on August 2nd, 2013.  
17 I also reviewed a report by Homer Staves dated July 8th, 2014,  
18 and a report by Thomas Cate dated September 3rd, 2014.

19 Q. Did you also go to the lake at some point?

20 A. I did, sir.

21 Q. And when was that?

22 A. That was on October 2nd, 2013.

23 Q. And what did your inspection of the lake reveal that  
24 would be relevant to your findings?

25 A. The location of the lake with respect to the campsite

BELLA - DIRECT - HERMESMANN

1 where the family was staying at the time of the incident, also  
2 with respect to surrounding sites, the basketball court, the  
3 swimming pool, the game room, that kind of thing in respect to  
4 the trailer park, so I could have an understanding of both  
5 where this incident occurred and what the witnesses, both  
6 Anthony and Michelle, were describing in their interviews with  
7 police immediately following the incident.

8 Q. What was the lighting like on August 8th, 2010 at Pine  
9 Haven campground at the time John Toribio entered the lake?

10 A. It was light outside.

11 Q. And what do you base that upon?

12 A. Well, that's based on the testimony that's been given in  
13 this case, the statements again that Michelle and Anthony gave  
14 to the police, and also my research into sunset on the date of  
15 the incident, the different lighting conditions available  
16 through natural lighting.

17 Q. And what time did the sun set on this particular evening?

18 A. So technically, what sunset means is when the top edge of  
19 the sun just drops just below the horizon so it's still light  
20 outside, because the sun is --

21 THE COURT: What time?

22 THE WITNESS: I'm sorry. 8:03 p.m.

23 BY MR HERMESMANN:

24 Q. What does sunset mean?

25 A. It means that it's still light outside, because the sun

BELLA - DIRECT - HERMESMANN

1 is refracting off of the atmosphere. So we have sunset out  
2 with light continuing for a period of time thereafter.

3 Q. And how long after sunset did this incident occur?

4 When I say "this incident," at the time John Toribio  
5 entered the lake?

6 A. Based on the police report, he entered the lake at about  
7 8:15 p.m., so about 12 minutes after sunset.

8 Q. Based upon your review of everything you had spoken to  
9 earlier and the sunset time, as you've just described, tell us  
10 your understanding of what occurred.

11 A. John and Michelle first entered the lake ahead of  
12 Anthony. They started going across the lake. Anthony caught  
13 up. He and Michelle got out in front of John, moved to the  
14 other edge of the lake. John was calling for help. Anthony  
15 believed that he was playing around, informed Michelle of  
16 that, continued up onto the beach. John was, again, calling  
17 for help. They turned and looked for John and could no longer  
18 see him in the lake. They believed that he had gotten out of  
19 the lake prior to them.

20 Q. Is this lake regulated at all in the State of New Jersey  
21 by any code, ordinance, statute, law, anything like that?

22 A. It is.

23 Q. And what is it regulated by?

24 A. By the New Jersey State Sanitary Code Chapter 9, Public  
25 Recreational Bathing.

BELLA - DIRECT - HERMESMANN

1 Q. And what does that sanitary code hold relative to this  
2 particular lake?

3 A. I'm sorry, I don't understand your question.

4 Q. What is the requirement under the code as to this lake?  
5 What do they have to do to be in compliance with the code?

6 A. They have to maintain a safe, clean, reasonably -- or  
7 reasonably safe swimming area, which means that they have to  
8 have tests, microbiological tests to ensure that the water is  
9 safe to swim in. They have to provide safety devices with  
10 which rescues can be made.

11 Q. Does the code have language in there regarding signs that  
12 are required?

13 A. It does.

14 Q. Based upon your review of this matter, was Pine Haven in  
15 compliance, that is, did they follow the code?

16 A. They did have the required signs, yes, sir.

17 Q. Did the code -- does the code have something called a  
18 specially-exempt facility?

19 A. Yes, sir.

20 Q. And what is a specially-exempt facility?

21 A. Well, based on New Jersey Code, those are facilities that  
22 are not required to have supervisory personnel, such as  
23 lifeguards.

24 Q. Was Pine Haven a specially-exempt facility?

25 A. Yes, sir.

BELLA - DIRECT - HERMESMANN

1 Q. And do you know why the code allows for specially-exempt  
2 facilities that do not require lifeguards?

3 A. Yes, sir.

4 Q. What's that?

5 A. Campgrounds, like hotels, apartment complexes,  
6 condominiums, et cetera, are considered extensions of the  
7 home. They are alternative living environments. And just  
8 like you don't have to have a lifeguard if you have a pool in  
9 your backyard, facilities that are extensions of the home are  
10 generally exempted from having lifeguards.

11 Q. What does the term industry standard mean?

12 A. There is a consensus standard that has been developed  
13 through the industry by the work of many people to help  
14 develop the industry standard of care. So what we expect that  
15 a reasonable person would do in the same or similar  
16 circumstances.

17 Q. Is there an industry standard that requires for lakes  
18 such as this, constant supervision?

19 A. No, sir.

20 Q. Is there an industry standard for a lake such as this,  
21 that requires lifeguards?

22 A. No, sir.

23 Q. Is there an industry standard for a lake such as this,  
24 that requires any type of patrolling?

25 A. No, sir.



BELLA - DIRECT - HERMESMANN

1 Q. Is there an industry standard for a lake such as this,  
2 that requires any type of lighting?

3 A. Well, it depends.

4 Q. What does it depend upon?

5 A. On whether or not the lake is intended -- or the bathing  
6 is intended to be used after dark.

7 Q. And what was your understanding as to whether or not this  
8 particular body of water, this lake, was intended to be used  
9 for bathing or swimming after dark?

10 A. No, sir, it was not.

11 Q. What would be the impact of having lighting on a lake  
12 such as this, after dark?

13 MR. VESPER: Your Honor, can I just object at this  
14 time. That was never offered in this expert's report. I'm  
15 not --

16 THE COURT: Repeat the question.

17 BY MR. HERMESMANN:

18 Q. What would be the impact of having lighting such as this  
19 on a lake after dark?

20 THE COURT: I'm going to allow that question.

21 MR. VESPER: Even though it wasn't reported.

22 THE COURT: Yeah, but I'm going to.

23 MR. VESPER: Okay.

24 THE COURT: We've had testimony on that.

25 MR. VESPER: Very well.

BELLA - DIRECT - HERMESMANN

1 THE COURT: Obviously, there's a dispute as to  
2 whether it attracts children or repels children.

3 MR. VESPER: I would agree, if she reported on that,  
4 respectfully.

5 THE COURT: All right. Go ahead.

6 BY MR. HERMESMANN:

7 Q. Ma'am, do you understand the question?

8 A. Yes, sir.

9 Q. Can you please answer it?

10 A. I would say it depends.

11 Q. On what?

12 A. On the type of lighting, the individual's response to the  
13 lighting. To me, lighting indicates that something is open,  
14 whether it's a shop or basketball courts or whatever the case  
15 may be.

16 MR. VESPER: That's her personal opinion, Your Honor.

17 THE COURT: I'm going to allow it.

18 Go ahead.

19 BY MR. HERMESMANN:

20 Q. Ma'am, did you have the opportunity to review the Pine  
21 Haven rules and regulations that apply to the lake?

22 A. Yes, sir.

23 Q. And do you know, based upon your review, whether or not  
24 Mr. and Mrs. Miller were aware of those regulations?

25 A. Yes, sir. Mr. Miller testified that he was.

BELLA - DIRECT - HERMESMANN

1 Q. Was there anything in your review of this matter that  
2 indicated that Pine Haven did not follow the industry standard  
3 for water safety for a lake such as this?

4 A. No, sir.

5 MR. HERMESMANN: That's all I have for you. Thank  
6 you.

7 THE COURT: Okay. Cross-examine.

8 MR. VESPER: Yes.

9 (CROSS-EXAMINATION OF MARIA BELLA BY MR. VESPER:)

10 Q. Hello again.

11 A. Hello.

12 Q. And I do have -- I think seven areas that I want to  
13 cover, so I'll try to keep you and everybody on target.

14 You would agree -- can I refer to you as Mrs. Bella or  
15 would you prefer Ms.?

16 A. Ms., please.

17 Q. Thank you. Ms. Bella, you would agree that once an  
18 aquatic facility of any kind assumes a duty, whether it's  
19 required or not, they have to perform that duty reasonably.  
20 Would you agree?

21 A. Yes, sir.

22 Q. So even though there's no industry standard that requires  
23 -- just as an example, there is no industry standard that  
24 requires lights, as far as you know, anywhere around a  
25 swimming facility of any type, if the owner/operator of the

BELLA - CROSS - VESPER

1 campground decides to put up lights, they have to make -- they  
2 have to maintain the lights properly. Wouldn't you agree?

3 A. Yes, sir.

4 Q. There may not be an industry standard, but once an  
5 owner/operator of an aquatic facility decides to do something,  
6 I would express it as once you decide to do a job, you've got  
7 to do it right. Would you agree?

8 A. You must do it properly, yes, sir.

9 Q. Now, in terms of your report, your report does not  
10 address -- and you didn't testify today to the best practices  
11 in the camping industry, did you?

12 A. No, sir.

13 Q. All right. And again, I'm not trying to -- criticizing  
14 you, I'm just saying that you're taking into account the  
15 industry that you're very experienced in, which includes  
16 hotels and water parks, and you've done -- and for schools,  
17 you've been a consultant for schools and kids on the swim team  
18 that you coached. I should talk to you about swim teams.

19 So, that is, all these different places that have water  
20 facilities where people swim, and you're addressing that  
21 entire aquatic industry?

22 A. Yes, sir. Any place that you chose to put in, again, a  
23 designated swim area, whether you put it in at a campground or  
24 you put it in -- I've seen them put them in at restaurants to  
25 attract patrons to the restaurant, but still, you have to

BELLA - CROSS - VESPER

1 follow the standard of care for the aquatic industry --

2 Q. Right.

3 A. -- as well as any local or state codes that apply.

4 Q. Right. And within that vast aquatic industry, including

5 even restaurants, there is a subset within that industry

6 that's the camping, campground, camping resort industry, is

7 there not?

8 A. Yes, sir.

9 Q. Now I want to -- so turn the page, I want to ask you

10 about some of the assumptions in your report. You have your

11 report there.

12 A. Yes, sir.

13 Q. And you were supplied -- and it appears on page -- I'm

14 referring now to -- yeah, Page 2 of your report.

15 Do you have that?

16 A. Yes.

17 Q. Okay. And you were supplied -- and it said -- and you

18 did review the colored copies of the 18 photographs labeled by

19 the New Jersey Southern Regional medical examiner.

20 These are the autopsy photographs.

21 A. Yes, sir.

22 Q. And you also were supplied, I'm assuming you have them,

23 there were -- this is Item No. 21 on Page 2.

24 You were supplied 14 photographs of the Pine Haven

25 campground that were dated December 6th of 2010.

BELLA - CROSS - VESPER

- 1 A. Yes, sir.
- 2 Q. Did you bring those with you?
- 3 A. I don't have printed-out copies of them, no, sir.
- 4 Q. All right. Well, to move things along, I ask you if you
- 5 recall -- oh, you know what, tab new paragraph.
- 6 That's what my wife likes to say.
- 7 I'll talk to you about the photographs in just a
- 8 second, but you were also supplied this diagram. It was much
- 9 smaller than this, but you remember you reviewed this?
- 10 A. Yes, sir.
- 11 Q. And is there anything misleading or confusing to the jury
- 12 about this diagram, in relation to understanding the facts
- 13 surrendering the events that led up to the drowning incident?
- 14 A. No, sir.
- 15 Q. Does this help?
- 16 A. Yes.
- 17 Q. Okay.
- 18 A. Well, it helped me, at least.
- 19 Q. It helped me, too. So back to the photographs.
- 20 In the -- among the -- among the -- was it 14 or 18
- 21 photographs that color? Were they?
- 22 A. 14.
- 23 Q. 14. Of the 14 photographs that were supplied to you, do
- 24 these look like two of them?
- 25 A. Yes, sir.

BELLA - CROSS - VESPER

1 Q. All right. And your report very accurately reflects that  
2 these two were taken on December of 2010?

3 A. Yes, sir.

4 Q. That's four months after the drowning incident?

5 A. Yes, sir.

6 Q. Now I'm assuming, but you correct me, you assumed, for  
7 purposes of your report, that these two signs were up in two  
8 separate locations around this lake, the swimming lake?

9 A. Well, I reviewed not only those photographs, but I also  
10 reviewed the county inspection report for this facility that  
11 was done about three weeks prior to this incident.

12 THE COURT: Answer his question. Ask the question  
13 again.

14 BY MR. VESPER:

15 Q. Did you or did you --

16 MR. VESPER: Thank you.

17 BY MR. VESPER:

18 Q. Did you or did you not assume that these two photographs  
19 -- did you not assume, for writing your report, that these two  
20 signs were up at one location in the lake, around the lake, or  
21 several?

22 A. At two separate locations.

23 Q. Okay. And you assumed that these two signs, as an  
24 aquatic safety expert, you would agree that not only does the  
25 law require that the signs be posted, correct?

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1 A. Yes, sir.

2 Q. And the law requires just this sign or both signs?

3 A. Both signs.

4 MR. VESPER: So for the record, because I sometimes  
5 forget, I've been holding up P-41, it's the persons under the  
6 age of 16 sign, and then there's the P --

7 THE COURT: 39?

8 MR. VESPER: 39. Thank you, Your Honor.

9 BY MR. VESPER:

10 Q. P-39 sign that says no lifeguard on duty.

11 These two signs are required by the law, correct?

12 A. Yes, sir.

13 Q. And as far as the spirit of the law is concerned, you not  
14 only have to post the signs, but you have to post them  
15 conspicuously, don't you?

16 A. Yes, sir.

17 Q. All right. Now, you assumed for the purposes of your  
18 report, that these two signs were conspicuous to anyone  
19 entering the swimming lake on August 8th of 2010, correct?

20 A. Yes, sir, that they were readily available to be seen.

21 Q. Yeah. Or another word for readily available to be seen  
22 would be, they were conspicuous to the people that were going  
23 into or out of the lake, correct?

24 A. Yes, sir.

25 Q. Now, do you know what the testimony -- and in this case,



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1 there were three 14 year olds that went into the lake at about  
2 -- around 8:15, correct?

3 A. Yes, sir.

4 Q. Now, if you know, was Michelle Wheeler ever at the lake  
5 before? If you know?

6 A. I don't recall.

7 Q. Okay. That's fine. I mean, there's things we all  
8 remember and there's things -- but what about -- well, do you  
9 know whether Michelle Wheeler saw any signs anywhere around  
10 the lake that day that she was there, that Sunday?

11 A. That was not asked by the police officers who interviewed  
12 her, and that is all I have from her, so I can't answer that,  
13 sir.

14 Q. All right. Fair enough. So you don't know what she  
15 testified to in her deposition or what she testified to here  
16 at trial?

17 A. No, sir.

18 Q. And I assume then -- do you know whether Anthony Dioscon,  
19 who was the other 14 year old on August 8th, whether --  
20 whether or not he saw any signs anywhere?

21 A. Again, that was not asked by the police officers and I  
22 have his witness statement.

23 Q. Okay. And you don't know what Mr. Dioscon testified to  
24 in this trial?

25 A. No, sir.

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1 Q. So again, I'm assuming -- you don't know for a fact what  
2 any -- when I say, "any" -- whether -- you don't know for a  
3 fact what Michelle Wheeler or Anthony Dioscon or Mr. and  
4 Mrs. Wheeler or any other witness testified about signage that  
5 they either saw or didn't see around the lake, testimony in  
6 this case?

7 A. I only have Mr. Wheeler's testimony and I don't recall  
8 what he testified to with regards to signage.

9 Q. All right. You would agree with me, that if they --  
10 because signs, whatever they're made of, signs deteriorate,  
11 don't they?

12 A. Yes, sir.

13 Q. And if a sign deteriorates and is not visible, for  
14 whatever reason, because it's just worn out, weathered,  
15 covered with weeds, it would, from your safety background and  
16 experience, would that satisfy you as an aquatic safety expert  
17 for the owner/operator's fulfillment of the state duty to post  
18 a sign, if the sign was weathered as I described?

19 A. If it was degradable and unreadable, no, sir, that would  
20 not be satisfactory.

21 Q. That would be pretty poor maintenance, wouldn't it?

22 A. Yes, sir.

23 Q. Oh, and before I -- the assumptions -- or things that you  
24 were asked to review, you were asked to review the report of  
25 an engineer, Thomas Cate?

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1 A. Yes, sir.

2 Q. That engineer is not -- as far as you know, certainly  
3 doesn't have aquatic safety credentials like you do. If you  
4 know.

5 A. I don't recall what's on his CV.

6 Q. You never worked with the engineer Cate before?

7 A. No, sir.

8 Q. All right. Now, when you went for your inspection, which  
9 was -- again, was in what year?

10 A. 2013.

11 Q. Okay. So when you were inspecting in 2013, did you  
12 notice any kind of surveillance cameras in place anywhere in  
13 the park, or were you not -- you were not there to look for  
14 surveillance cameras?

15 A. I don't recall seeing any surveillance cameras.

16 Q. Fair enough. And you mentioned that -- let me ask you  
17 one more thing about the signs.

18 The law requires that if you're the owner/operator of a  
19 swimming lake, that you post a sign, but there's no  
20 requirement as to how many signs, is there?

21 A. No, sir.

22 Q. And insofar -- you testified that your understanding of  
23 the facts were that the 14 year olds were in the water and at  
24 some point, at some point, as they were swimming in the swim  
25 lake, John called for help, Anthony assumed that John was

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1 playing around, they kept swimming, and then I believe you  
2 said, and then John called for help again?

3 A. Yes, sir.

4 Q. So with your safety -- especially aquatic safety  
5 experience, and you're certainly familiar with drownings.

6 A. Yes, sir.

7 Q. In your mind, were you able to time -- tell the ladies  
8 and gentlemen of the jury, how much time elapsed from the  
9 first call for help and the second call for help? Did you  
10 time that or you didn't?

11 A. No, sir. I wasn't there to time that. I can tell you --

12 Q. Well, if you didn't do it, then I'm not going to ask you  
13 to.

14 So you weren't asked to give an estimate, and I didn't  
15 see it in your report, as to how long it took before John went  
16 under water or how long it took for John to actually drown.  
17 You were not asked to do that, were you?

18 A. No, sir.

19 Q. All right. Then I won't ask you.

20 Okay. Third topic. You mentioned in your report on  
21 Page 2, go back to Page 2. Yeah, the last paragraph. You  
22 talk about aquatic -- it's the second sentence of your last  
23 paragraph.

24 The aquatic amenities at this campground include the  
25 swimming pool, kiddie pool, swimming lake and a fishing lake.

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1 A. Yes, sir.

2 Q. And those are the aquatic amenities, correct?

3 A. Yes, sir.

4 Q. And at this park, would you consider -- you saw the whale  
5 when you went for your inspection, did you not, in the  
6 swimming lake?

7 A. Yes, sir.

8 Q. And was the whale spouting?

9 A. It was.

10 Q. Now, from your experience with all kinds of different  
11 aquatic facilities and restaurants and also in campgrounds,  
12 would you consider that the whale is an aquatic amenity?

13 A. It's part of the lake, yes, sir.

14 Q. Yeah. I mean, it's not a -- it's not a water slide and  
15 it's not a diving board, but it's certainly an amenity at that  
16 swimming lake, is it not?

17 A. Yes, sir.

18 Q. Now, as far as the whale is concerned, are you familiar  
19 -- do you know there was a rule about the whale for the  
20 swimmers?

21 A. Yes, sir.

22 Q. What was the rule? This is -- by the way, excuse me for  
23 interrupting. But this is the campground -- this is the Pine  
24 Haven Camping Resort rule.

25 A. And I'm trying to remember the sign that was on the whale

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1 at the time. I haven't looked at it for quite some time.

2 Q. Okay.

3 A. So I believe it was that no one was to be on the whale.

4 Q. Okay.

5 A. But I don't recall the specific rule.

6 Q. That's all right. But there was a sign that said, like,  
7 stay off the whale?

8 A. Something to that effect, yes, sir, and that would be  
9 proper signage.

10 Q. Okay. And the sign to stay off the whale, do you know --  
11 and the rule to not go on the whale, do you know whether that  
12 was enforced by the -- by Pine Haven?

13 A. I don't know.

14 Q. Also, at --

15 THE COURT: On the night of the drowning, did any of  
16 the three stop at the whale or get on the whale?

17 THE WITNESS: No, sir.

18 MR. VESPER: We agree, but -- yeah, that's  
19 stipulated.

20 THE COURT: I'm asking her.

21 MR. VESPER: All right. It just wasn't an issue.

22 But in any event, we agree.

23 BY MR. VESPER:

24 Q. So the -- around this swim lake, there's a beach,  
25 correct?

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1 A. Yes, sir.

2 Q. And the beach is also part of the attraction of the --

3 it's one of the amenities of the swimming lake, it starts --

4 you don't go right from the road into the water, there's a

5 beach, correct?

6 A. Yes, sir.

7 Q. So the beach is considered part of the aquatic amenity.

8 A. Yes, sir.

9 Q. Of that --

10 A. Of that aquatic amenity, yes, sir.

11 Q. That amenity. Right.

12 And on the beach, there's a playground.

13 A. Yes, sir.

14 Q. All right. And when you were there, the playground

15 consisted of what?

16 A. I recall swings. I don't recall anything else.

17 Q. All right. So there wasn't like a merry-go-round or a

18 pirate ship when you arrived?

19 A. I don't recall any of that, no, sir.

20 Q. You didn't see the pirate ship?

21 A. Again, I don't recall that. My focus was on the lake and

22 determining the cause of this drowning.

23 Q. All right. I'm talking -- I'm concerned about the

24 overall operation of the swim lake.

25 So the operator of the swim lake is -- was the

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1 playground equipment that you saw, was it close to the lake?

2 A. Define close. It was a far enough distance away that  
3 nobody was going to, for instance, jump the swing set into the  
4 lake.

5 Q. No, I certainly agree. But they could -- once they were  
6 finished on the swings, they could certainly walk a very short  
7 distance and go into the lake, couldn't they?

8 A. They could. I think it was something like 80 or 90 feet.

9 Q. All right. That much?

10 A. I believe so. I can refer to my notes, if you would like  
11 me to.

12 Q. Well, a photograph would be better, but if you have  
13 notes, go ahead. I'm --

14 A. These measurements were taken from the center of the  
15 swing set to the edge of the lake was 91 feet.

16 Q. Okay. And were there any signs about either closing  
17 hours or the swimming signs anywhere near the playground that  
18 you saw when you were there?

19 A. They were, they were en route to the playground and the  
20 swimming lake.

21 Q. Over by the arcade?

22 A. The ones that I specifically recall were on the road. So  
23 between the basketball court and the office store, as you walk  
24 down towards the lake, they were along that main roadway.

25 Q. Just so we're all sure, there's been testimony, and I'm



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1 going to show you the diagram which I believe is P-1 --

2 MR. CICCOTTA: A.

3 MR. VESPER: A, thank you.

4 BY MR. VESPER:

5 Q. So P-1A, I'll just hold this up. There's been testimony

6 by representatives of Pine Haven, you see where these two

7 crosses -- two sets of crosses, there's two here?

8 A. Yes, sir.

9 Q. And two here?

10 A. Yes, sir.

11 Q. Do you see those, Ms. Bella? So which set of signs did

12 you see when you were there?

13 A. This set here.

14 Q. Okay.

15 A. I may have also seen signs over here. Again, I don't

16 recall. My focus was predominately in this area since it was

17 my understanding that they entered the lake here and went in

18 this direction.

19 Q. Okay. So -- and again, you were assuming that these two

20 signs, they would have passed when they went into the water?

21 A. I -- again, I -- and I wasn't assuming that they would

22 have passed the signs. At the time of my inspection, the

23 signs were readily visible at the lake.

24 Q. Okay. And obviously, if the signs weren't there on

25 August 8th, there's -- nobody would have seen them if they're

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1 not there.

2 A. Yes, sir.

3 Q. Now, you mentioned -- you mentioned that these signs at  
4 this -- no, that's okay. I don't want you to --

5 A. All right.

6 Q. This has a tendency to hit people in the head.

7 So over here, see this? These two -- the location,  
8 approximate location of the two signs, you said were also  
9 either visible or accessible to people coming from the  
10 basketball court.

11 So this is not to scale, but the basketball court  
12 that's here is more like over here, is it not, like closer to  
13 the road? Do you see where the basketball court is, here?

14 A. Again, and this was all based on memory --

15 Q. Yeah.

16 A. -- but I recall the basketball court or there being  
17 courts beyond the general store when I was there.

18 Q. Just point.

19 A. I recall there being courts somewhere in this area at the  
20 time that I was there.

21 Q. Okay. So as best you can recall, the basketball courts  
22 were not as they're shown on P-1A, but they were closer to the  
23 office?

24 A. Yes, again, they were in this -- this general -- this  
25 general area just beyond the general store.

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1 Q. Okay. And closer to the main -- this is the main road?

2 A. I don't know that this is to scale. The best I can do is

3 tell you --

4 Q. Yeah.

5 A. -- what I recall, and again, my focus was on the lake.

6 Q. Okay.

7 A. But I walked passed the general store, because I took a

8 measurement, again, from the center of the swing set to the

9 store, which was a hundred feet, and then continued on to the

10 basketball court. So from here to the basketball court was

11 208 feet.

12 Q. Oh, okay. So you took those -- thank you very much. You

13 took some good measurements.

14 A. Yes, sir.

15 Q. Now, in terms of the rule about the closing of the lake,

16 are you aware that there's testimony in this case that as of

17 7 o'clock on Sunday night, when -- when the store that we

18 just, you know, we were talking about, that store was closed

19 and the facilities in the campground on Sunday were closed at

20 7 o'clock. As of 7 o'clock, the lake was closed.

21 A. I don't know anything about that testimony, sir.

22 Q. All right. If you assume, then, that as far as -- well,

23 let me ask you this way. Did you assume that the -- that the

24 rule of the campground was that the swim lake closed when it

25 became dark or dusk?

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1 A. Yes, sir.

2 Q. Okay. I'm going to ask you to assume that in addition to  
3 that -- that is one rule, and then there's also a rule that if  
4 the campground closes, like the store, the operation of the  
5 campground, if it closes earlier than dusk, then the -- then  
6 the lake is not open to anyone of any age.

7 Can you assume that that's a rule?

8 A. Yes, sir.

9 Q. So if you assume that -- that on Sunday, August 8th,  
10 after 7 o'clock, no one of any age -- forget that they were  
11 14, but no one of any age is allowed to swim in that lake,  
12 then who, after 7 o'clock on that Sunday, on behalf of Pine  
13 Haven was going to enforce that rule, if you know?

14 A. I don't know who was identified to do so.

15 Q. All right. Now, normally, when you -- you do risk  
16 management and you're asked, as a -- as an aquatic safety  
17 expert to come to aquatic facilities and advise people,  
18 correct?

19 A. Yes, sir.

20 Q. All right. Now, when you're asked by reasonable people,  
21 not maybe the most cautious, not maybe the -- I don't want to  
22 say -- not maybe the most careless, all right, but by  
23 reasonable people, when they ask you for advice about who  
24 should enforce whether it's a pool, a swimming lake, whatever  
25 swimming facility there is, to enforce the rules, usually, in

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1 the majority of cases, don't you tell them -- or maybe it's in  
2 all the cases, don't you tell the owner/operator that someone  
3 has to be designated, at least one person, to enforce the  
4 rule? Let's say it's the closing rule. Wouldn't you advise  
5 them?

6 A. Yes, sir.

7 Q. And I'm assuming, you correct me if I'm wrong, other than  
8 for this case, you were consulted for this case, obviously,  
9 because you're here, but were you consulted by anyone on  
10 behalf of management or Diversified Investments, Inc., the  
11 owners to advise them prior to August 8th of 2010 about the  
12 safe operation of their aquatic facilities?

13 A. Not that I recall specifically.

14 Q. All right. I mean, if you were -- were you ever  
15 contacted by Mr. Jordan, other than for this case, and prior  
16 to August 8th of 2010, to give either him or his staff advice  
17 about aquatic safety?

18 A. Again, not that I recall specifically, but I have many  
19 people attend my courses.

20 Q. Sure.

21 A. So I can't say absolutely no. Just in case one of their  
22 personnel was in one of my aquatic safety courses.

23 Q. Okay. It may be that somebody from Diversified  
24 Industries, Inc., and even from Pine Haven came to one of your  
25 classes?

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1 A. It's possible.

2 Q. Right. And you teach some wonderful classes. That's a  
3 gratuitous --

4 THE COURT: Oh, come on. Let's go.

5 MR. VESPER: I'll try. I won't withdraw that.

6 THE WITNESS: I do my very best.

7 BY MR. VESPER:

8 Q. Yes, you do.

9 So when you teach a class, you would teach the people  
10 there from whatever facility they're from, campgrounds or  
11 pools or hotels, you would teach them what you're telling us  
12 here, that if you have rules, like closing rules, one person  
13 should be designated in your staff to enforce those rules.  
14 That's what you would teach them.

15 A. Yes, sir.

16 Q. All right. And would you agree with me that if the  
17 designee, let's say, the designee for enforcing the no  
18 swimming after closing time rule, saw three 14 year olds  
19 getting into the water, they would do something about getting  
20 them out of the water, wouldn't they?

21 A. They should, yes, sir.

22 Q. Yes. And have you ever seen what -- there's 14 year olds  
23 and then there's 14 -- have you ever seen what these three 14  
24 year olds -- well, not when they were 14.

25 Did you ever see what they looked like?

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1 A. What John looked like, yes, sir.

2 Q. He looks like he's 14, doesn't he?

3 A. Well, that's an interesting question.

4 THE COURT: I'm going to strike that question.

5 Ask your next question.

6 BY MR. VESPER:

7 Q. Sorry. There's another rule that Pine Haven has, and I'm  
8 sure most of the facilities that you advise have rules about  
9 underage drinking, that there shall be no underage drinking,  
10 correct?

11 A. Yes, sir.

12 Q. Now from what you've read in this case --

13 MR. HERMESMANN: I've got to object to this line of  
14 questioning.

15 THE COURT: Yes, there's no issue of underage  
16 drinking in this case. Why even bring it up?

17 MR. VESPER: It has to do with the negligent  
18 operation of this campground.

19 THE COURT: There was no testimony as to there was  
20 any underage drinking in this case.

21 MR. VESPER: There was testimony.

22 THE COURT: Not --

23 MR. VESPER: There was testimony.

24 THE COURT: Not for the three people involved.  
25 There's no inference anywhere.

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1 MR. VESPER: It's not an inference. There was direct  
2 testimony, Your Honor.

3 MR. HERMESMANN: Your Honor, if we're going to have  
4 this conversation, can we have it at sidebar?

5 MR. VESPER: I'd like to just move along.

6 THE COURT: I --

7 BY MR. VESPER:

8 Q. Would you agree that any rules that have to do with the  
9 safety of children should be enforced by the owner/operators  
10 of the -- of any aquatic facility, wouldn't you agree?

11 A. Within reason, yes, sir.

12 Q. Yeah, within reason. I'm going to talk to you -- that's  
13 maybe the last point about reasonable risk analysis.

14 You do risk analysis, don't you?

15 A. Yes, sir.

16 Q. But you -- as far as you can think right here and now,  
17 you never did a risk analysis for the Pine Haven people, did  
18 you?

19 A. Not at that site, no, sir.

20 Q. Right. Now, in -- on the Robson -- and Robson Forensic,  
21 you've worked for, for how many years?

22 A. 11 years.

23 Q. Okay. And they supply forensic experts for both sides,  
24 plaintiffs and defense in cases like this, correct?

25 A. Yes, sir.



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1 Q. P-38 is going to be -- this is an article that is posted  
2 by Robson Forensic that -- it was attributed to you -- first,  
3 let me show you before I start.

4 MR. HERMESMANN: Could I see it, please?

5 MR. VESPER: Yeah, sure.

6 THE COURT: P-38?

7 MR. VESPER: P-38, yes, Your Honor.

8 BY MR. VESPER:

9 Q. Let me just show you this.

10 MR. HERMESMANN: Your Honor, I'm going to have an  
11 objection regarding this. Can I be heard at sidebar?

12 THE COURT: Can I see it? Let's go to sidebar.

13 (SIDEBAR AS FOLLOWS:)

14 THE COURT: Okay.

15 MR. HERMESMANN: Objection.

16 THE COURT: You said your objection.

17 MR. HERMESMANN: Yes.

18 THE COURT: That's why I'm here.

19 MR. HERMESMANN: I understand. The objection, as  
20 you'll neither note at the beginning of this, and I haven't  
21 read through the entire article because it was handed to me  
22 moments ago, it applies to swimming pools. This is not a  
23 swimming pool case. This is a lake case. This is a case  
24 that's governed by the sanitary code and there's a different  
25 set of standards. So it's clear at the beginning of this

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1 article that this is meant to address swimming pools.

2 MR. VESPER: She's testified though pools are  
3 included in aquatic safety.

4 THE COURT: There's -- the question, there's a  
5 difference between -- if you put a fence around a swimming  
6 pool, just to state one, you have to have a fence around it.  
7 You don't have to have a fence around a lake.

8 MR. VESPER: I agree, but it's a way of enforcing the  
9 rules, it's an option that was available and I don't believe  
10 that the plaintiff should be limited to the minimum  
11 requirements of the state. The state --

12 THE COURT: The first one is check barriers, ensure  
13 that chain link hasn't been cut. First one, has nothing to  
14 do --

15 MR. HERMESMANN: Nothing to do.

16 THE COURT: Run in-service training with all staff  
17 throughout the season. Emergency skills should be practiced  
18 at the environment which they will be used. Has nothing to do  
19 with this case. Next says make certain that signage meets  
20 code. Well, everyone agrees with that.

21 MR. HERMESMANN: It's been testified to at length by  
22 this witness.

23 THE COURT: Whether it does or not is a different  
24 issue.

25 MR. HERMESMANN: Whether it exists or not.

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1 THE COURT: There's been conflicting testimony on  
2 that.

3 MR. VESPER: Right.

4 THE COURT: But nobody disagrees with the rule,  
5 whatever the law of signage. It has to be complied with. Mr.  
6 Vesper, in fact it's one of his points that --

7 MR. VESPER: Right.

8 THE COURT: -- there should be signage and that his  
9 testimony is at least that it wasn't there, or it was obscured  
10 or -- check your chemical stock has nothing to do with the  
11 lake. Enlist experts for technical assistance with electrical  
12 and gas powered equipment. Nothing to do with this case.  
13 Measure the length, width and depth of each pool. Has nothing  
14 to do with this case. The other ones, visit the CDC's website  
15 blah, blah, blah, slash, swimming. View the fecal accident  
16 response. Nothing to do with this case. No, I'm not going to  
17 allow this.

18 MR. VESPER: All right.

19 THE COURT: I'm not going to allow this.

20 MR. VESPER: All right.

21 THE COURT: This -- maybe you think this will, you  
22 know, somehow or -- I don't know what you're thinking it will  
23 do, but it has nothing to do with this case.

24 MR. VESPER: Okay. Understood. Thank you, Your  
25 Honor.

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1 MR. HERMESMANN: Thank you.

2 (END OF SIDEBAR.)

3 BY MR. VESPER:

4 Q. Besides yourself, Ms. Bella, there are other aquatic  
5 safety experts available in New Jersey?

6 A. Yes, sir.

7 Q. Right, and besides Robson Forensics, there are, you know,  
8 like, not those that are trained, which you're only one of  
9 four trained to teach the teachers, but how many would you  
10 estimate are available for New Jersey, for this area?

11 A. I know of only one other person who's been identified as  
12 a testifying expert.

13 Q. No, no, no, I'm sorry. I didn't make my question clear.

14 Not as an expert to come into court and testify, I mean  
15 as a consultant for the owners and operators.

16 If an owner/operator wants to find out or learn about  
17 aquatic safety, they can attend seminars that you give,  
18 correct?

19 A. Yes, sir.

20 Q. And those are several times a year?

21 A. Yes, sir.

22 Q. All right. And they're -- and they're easily accessible  
23 because they are in New Jersey, correct?

24 A. No, sir. The courses that I offer are primarily in  
25 Pennsylvania. I do go to Virginia at the request of the

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1 National Recreation and Park Association. I do have attendees  
2 come from New Jersey and other states to those courses at  
3 various locations.

4 Q. Okay. Maybe I'm thinking of the ICLE courses in New  
5 Jersey.

6 But in any event, people who own and operate aquatic  
7 facilities can attend the safety seminars that are given, the  
8 lectures, you have materials that are available that they can  
9 obtain online or by mailing in requests, correct?

10 A. Yes, sir.

11 Q. And as far as -- again, I'm back to the question about if  
12 you know, in this Delaware Valley area within a couple hours  
13 of Pine Haven, are there safety consultants that someone from  
14 Pine Haven could pick up the phone and call to come down and  
15 look at the facility and give them some ideas?

16 A. I do not know.

17 Q. Okay. All right. So, I've got two more points to cover.

18 So -- but before I cover them, let me ask you about  
19 facilities that -- there's no requirement for a swimming lake  
20 operator, like Pine Haven Camping Resort, to have surveillance  
21 cameras anywhere, correct?

22 A. It's --

23 Q. There's no industry written rule or regulation. Excuse  
24 me for interrupting. Correct?

25 A. I'm sorry, anywhere is the problem. I can speak again to

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1 aquatic facilities and --

2 Q. Right.

3 A. -- no, there is no requirement for security cameras at  
4 aquatic facilities.

5 Q. Okay. Would you agree, however, as a safety consultant,  
6 that once you do decide to put up surveillance cameras, that  
7 they should work?

8 A. Yes, sir.

9 Q. And why is it -- why is it important that they should  
10 work?

11 A. Well, surveillance cameras in the aquatic industry, when  
12 used, are used to review operations, typically after an  
13 incident or to look at ebb and flow of patrons for staffing  
14 purposes.

15 Q. Yeah, and that's a good point. The surveillance video  
16 cameras, and the video that's produced, they don't have to be  
17 constantly monitored, do they?

18 A. No, sir.

19 Q. But you would, if there was an incident, look at the --  
20 at the video to see if somebody had to be either sanctioned or  
21 warned about violating rules, correct?

22 A. Yes, sir, or if staff needed to be retrained.

23 Q. Yeah. So the ongoing review of the video is to include  
24 the overall --

25 A. I'm --

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1 Q. -- safety of the aquatic operation, correct?

2 THE COURT: Go ahead, you can answer.

3 BY MR. VESPER:

4 Q. Correct?

5 THE COURT: But that's the last question on this.

6 A. Yes, sir.

7 THE COURT: Was there a video camera anywhere around  
8 the lake when you were there?

9 THE WITNESS: Not to my knowledge, sir.

10 THE COURT: Okay.

11 MR. VESPER: There was a video camera around the  
12 pool.

13 THE COURT: Yeah, but the pool is not the lake. The  
14 accident didn't happen in the pool, it happened at the lake.

15 MR. VESPER: I understand that. This is --

16 THE COURT: No, don't argue with me.

17 MR. VESPER: I'm not.

18 THE COURT: I'm telling you, you can't -- you're  
19 implying something that is not the law.

20 BY MR. VESPER:

21 Q. So there's no industry standard to put up a sensor light  
22 anywhere on a campground or on an aquatic facility, is there?

23 A sensor light that -- when I say a "sensor," somebody  
24 moves, it picks that up, it goes -- is there such a  
25 requirement?

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1 A. Not for an aquatic facility, no, sir.

2 Q. Okay. However, if, if the owner/operator of an aquatic  
3 facility does decide to use motion sensor lights, you would  
4 expect the lights to work, correct?

5 A. Yes, sir.

6 Q. And wouldn't you expect, as an aquatic safety expert,  
7 that the light should be placed strategically, correct?

8 A. Yes, sir.

9 Q. Do you know the approximate cost for a sensor light?

10 A. For commercial application? No, sir.

11 THE COURT: Did you see sensor lights around the  
12 lake?

13 THE WITNESS: No, sir.

14 MR. VESPER: Whether she saw them or not, there's  
15 testimony that they were there. Not -- I'm sorry, not around  
16 the lake, I don't want to confuse this issue.

17 THE COURT: Yeah, I know, maybe they were somewhere  
18 else, but I recall no testimony that they were around the  
19 lake.

20 MR. VESPER: Agreed. That's agreed.

21 BY MR. VESPER:

22 Q. Now, do you know how much was in the budget of Pine Haven  
23 Camping Resort for the enforcement of the safety -- aquatic  
24 safety at the campground?

25 A. No, sir.



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1 Q. A risk analysis, would you agree, has, I guess, five  
2 steps. If you're a safety consultant and you're asked to come  
3 to an aquatic facility, the safety expert, such as yourself,  
4 Ms. Bella, you would expect that the owner/operator would know  
5 the environment in which business invitees or guests of that  
6 facility are going to engage in water activities.

7 You would expect the owner to know that, correct?

8 A. I'm sorry. You lost me on the lead in.

9 Could you restate that, please.

10 Q. All right. When you start out with a risk analysis of a  
11 water facility, as an aquatic safety expert, do you expect  
12 that the owner/operator will know how the water environment is  
13 going to be used?

14 A. That would be part of my work as a consultant to address  
15 that component. That's usually predesign in construction.

16 Q. No, no, not construction, I'm sorry. Excuse me for  
17 interrupting, but I'm not into construction now.

18 The facility, like in this case, the swimming lake  
19 already existed, correct? It already exists. And you come on  
20 site.

21 Now, does it make a difference whether it's man-made or  
22 nature-made, the swimming lake?

23 A. It can make a difference, yes.

24 Q. In the analysis of the risks?

25 A. Yes, and that has to do with the equipment that would be

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1 used in either application.

2 Q. Okay. Let's focus, then, on -- it's a man-made swimming  
3 lake, and when you come to analyze the risks at that man-made  
4 swimming lake, you have to know and understand the usages that  
5 people who are invited to swim in that man-made lake are going  
6 to make or do in that lake, correct?

7 A. Yes, or the foreseeable or anticipated usages based on  
8 the demographics.

9 Q. Right. The second step, once you -- as an aquatic safety  
10 expert, once you see how the aquatic facility is going to be  
11 used, you would also evaluate how the aquatic amenities,  
12 whatever they are, how the aquatic amenities are going to be  
13 used, wouldn't you?

14 A. Yes, sir.

15 Q. Okay. Now, once you understand that, isn't the next step  
16 to try to appreciate what is reasonably -- what's reasonably  
17 foreseeable risks of serious injury or death to the people  
18 that use the facility or the amenities?

19 A. Yes, sir.

20 Q. Right. And then the third step in the -- and this is  
21 risk analysis, my interpretation of it, but you correct me if  
22 I'm wrong, the next step in risk analysis is once you've  
23 identified reasonably foreseeable risks of serious injury or  
24 death to the users of that aquatic facility, do you try, as  
25 reasonably as possible, as practical, to eliminate the risk,

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1 if it can be done?

2 A. Well, there is a hierarchy.

3 Q. Yeah.

4 A. Elimination, yes. If feasible.

5 Q. If feasible?

6 A. If it's cost effective and if it doesn't take away the  
7 attractions. Certainly, we're not going to address a drowning  
8 hazard by filling in all swimming areas.

9 Q. Certainly.

10 A. So we will remove the hazard if possible.

11 Q. If possible and feasible, yeah, sorry to interrupt.

12 And the second step is to either ameliorate, or the  
13 other word is reduce the risk?

14 A. Yes, sir.

15 Q. Okay. First step is, if you can do it feasibly, is to  
16 eliminate the risk. Third (sic) step is you try to lessen the  
17 risk?

18 A. Reduce the hazard, yes, sir.

19 Q. And what's the third and last risk -- yeah, risk analysis  
20 step?

21 A. Well, you phrased them differently than I would.

22 Q. Go ahead.

23 A. We -- and this is -- this is not my rule, this is the  
24 National Safety Council's hierarchy.

25 If possible, remove the hazard. If you can't remove

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1 the hazard, guard against the hazard, and if you can't guard  
2 against the hazard, then warn about the hazard.

3 Q. Okay. Now, the least effective of those methods of  
4 either eliminating, reducing -- by the way, we're talking  
5 about risk or hazard of serious injury or death. So we're  
6 talking about serious risks.

7 A. Yes, sir.

8 Q. All right. So the least effective of the -- of the risk  
9 removal or hazard removal method is to put up a sign that  
10 warns people of the risk of serious injury or death, isn't it?

11 A. Well, I would say that depends on the individual.

12 Certainly, I read signage and follow rules to the best of my  
13 ability. I can't say that everybody does, but having operated  
14 aquatic facilities for many, many years, I can tell you that  
15 many people do read the rules and some people don't.

16 Q. Which is the least effective of risk removal?

17 A. Again, it would depend on the individual.

18 Q. All right. If you post a sign, but the risk remains and  
19 you can -- again, feasibly and reasonably remove the risk, you  
20 should, shouldn't you?

21 A. If reasonable, yes, sir.

22 Q. Yeah.

23 THE COURT: In a water facility, you can never remove  
24 the risk of drowning.

25 THE WITNESS: Not entirely, no, sir.

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1 THE COURT: Yeah, it's impossible.

2 THE WITNESS: Correct.

3 THE COURT: Somebody goes in the water, who knows,  
4 has a cramp, has a heart attack, you can't eliminate the risk  
5 of drowning, can you?

6 THE WITNESS: No, sir, not completely, although we  
7 will do our level best.

8 BY MR. VESPER:

9 Q. And so other than, you know, filling in the lake, there  
10 are ways of reducing the risk of drowning, aren't there?

11 A. Yes, sir.

12 Q. And is one of them patrolling the area? Not having a  
13 lifeguard, that's one way, but I'm talking about just  
14 patrolling on a regular basis, regular patrol.

15 A. Well, at the moment that the patrol is there, yes, sir.

16 Q. Well, after a few months or seasons or years go by and  
17 people know that a regular patrol is coming by, doesn't that  
18 develop a culture within a facility that the area is being  
19 monitored and the rules are being enforced? Doesn't it?

20 A. It certainly could, sir.

21 Q. Okay. So even with the sign, if you post the sign and it  
22 is feasible to -- let me just talk about feasibility.

23 Do you know whether the -- there was a roving patrol at  
24 the Pine Haven camp?

25 A. There was, I believe, on Fridays and Saturday evenings.

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1 Q. And do you know how much more it would have cost for the  
2 roving patrol to have been there for the same hours or for  
3 different hours -- well, let me use this.

4 From the time of closing up until 1 or 2 o'clock in the  
5 morning for the entire summer between Memorial -- when I say  
6 the summer, Memorial Day to Labor Day. Do you know what the  
7 cost of that would be?

8 A. No, sir.

9 Q. You read Mr. Miller's testimony, did you not, Tim Miller?

10 A. Yes, sir.

11 Q. And wasn't there -- did Pine Haven spend \$15,000 for a  
12 couple hundred trees that were planted?

13 THE COURT: I'm -- don't answer that question. I'm  
14 striking it. I'm striking the question.

15 BY MR. VESPER:

16 Q. Would it have cost more or less than \$15,000 for Pine  
17 Haven to have a roving patrol?

18 THE COURT: For what, a month, a week, a year, four  
19 hours, 20 hours?

20 BY MR. VESPER:

21 Q. Did you understand that my question has to do with the  
22 season, Ms. Bella?

23 THE COURT: 24 hours a day? 12 hours a day? Seven  
24 days a week?

25 MR. VESPER: I'll try to --

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1 THE COURT: You can't answer the question unless you  
2 give her parameters.

3 BY MR. VESPER:

4 Q. I'll try to give you parameters. I'm not trying to  
5 confuse you. Between time of closing and 1 or 2 -- when did  
6 the -- let me back up.

7 When did the roving patrols stop the work that were  
8 paid for by the Pine Haven people for Fridays and Saturdays?

9 A. I don't know, sir.

10 Q. As an aquatic safety expert, would you have some opinion  
11 as to what would be the reasonable hours for a roving patrol?

12 A. As an aquatic safety expert, I wouldn't count on a roving  
13 patrol to control activity in the swimming lake.

14 Q. For a roving patrol, is -- and -- this is a good time to  
15 ask you. Do you know what the majority of campgrounds do, if  
16 they have swimming facilities, whether they have roving  
17 patrols or not, the majority?

18 THE COURT: Well, wait a minute. Roving patrols  
19 around the swimming area.

20 MR. VESPER: Yes.

21 THE COURT: Not necessarily around the 80 acres or  
22 hundred acres of the park.

23 MR. VESPER: It is also around the park in this case.  
24 Please, let me state the question my way.

25 THE COURT: Yeah, but you can't --

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1 BY MR. VESPER:

2 Q. Have you heard --

3 THE COURT: You've got to specify whether you're  
4 talking about going around the swimming facility or around the  
5 whole property. Because that's a big difference.

6 BY MR. VESPER:

7 Q. Have you been -- do you know how many camping grounds  
8 there are in the United States?

9 A. No, sir.

10 Q. And I would take it that from your background and  
11 experience, you have not been to 50 percent of all the  
12 campgrounds in North America, have you?

13 A. No, sir.

14 Q. All right. And I would take it, then, that you do not  
15 know what the majority of the campgrounds in the United  
16 States, who have aquatic facilities, I'm talking about  
17 campgrounds, just camping facilities, those camping facilities  
18 that do have aquatic facilities for swimming, do you know what  
19 the majority of those camp owners and managers and operators  
20 do, as far as roving patrols?

21 A. No, sir.

22 Q. Do you know what -- so you don't know what the best  
23 practices are in the camping industry, do you?

24 A. With regards to roving patrols?

25 Q. With regard to roving patrols or with regard to -- yeah,



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1 with regard to roving patrols.

2 A. No, sir. Again, my area of expertise is aquatic safety.

3 Q. Your practice areas are listed, and you certainly are an  
4 aquatic safety expert.

5 Your practice areas do not list camping facilities, do  
6 they?

7 A. No, sir.

8 MR. VESPER: No further questions.

9 THE COURT: Redirect.

10 (REDIRECT EXAMINATION OF MARIA BELLA BY MR. HERMESMANN:)

11 Q. Ms. Bella, on cross-examination, you were asked some  
12 questions about reasonableness.

13 Is there anything in this matter, based upon your  
14 entire review, that indicates that Pine Haven did not behave  
15 reasonably or within the industry standard?

16 MR. VESPER: Could we just ask a more specific  
17 question as to what he's addressing?

18 THE COURT: The answer is -- it's no more vague than  
19 any question you asked.

20 No, I'm going to allow that question.

21 MR. VESPER: Very well.

22 THE WITNESS: No, sir.

23 BY MR. HERMESMANN:

24 Q. And your background certainly includes training of people  
25 who work on lakes and campgrounds, correct?

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1 A. Yes, sir.

2 Q. And you have extensive background relative to campground  
3 lakes, is that correct?

4 A. Yes, sir.

5 Q. You were asked questions about signs that were up.

6 Did you have the opportunity, as part of your review,  
7 to look at the Cape May County Department of Health inspection  
8 that took place on July 21st, 2010?

9 A. Yes, sir.

10 Q. And what did that inspection report reveal to you?

11 A. That signage -- required signage, state-required safety  
12 signage was present at this facility, at the swimming lake,  
13 three weeks prior to this incident.

14 Q. As to surveillance cameras, is there any requirement  
15 under the industry standard of reasonableness that there be  
16 such cameras at a lake, at a camp?

17 A. No, sir. That's an optional item.

18 Q. And I believe that you testified earlier about the rules  
19 and regulations that are in writing at camp -- at Pine Haven,  
20 is that correct?

21 A. Yes, sir.

22 Q. And do those rules and regulations indicate on Page 3  
23 that there's no swimming permitted after dark?

24 A. Yes, sir.

25 Q. What's your understanding as to the number of miles that

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1 are located, as far as roads, throughout the Pine Haven  
2 campground?

3 A. About four-and-a-half miles, sir.

4 Q. And as to aquatic safety, is there any industry standard  
5 that requires any roving patrol of a lake at a campground?

6 A. No, sir.

7 Q. What's the expectation --

8 THE COURT: Before you -- you have no personal  
9 knowledge of what is done in the industry, in terms of roving  
10 patrols. You just don't know.

11 THE WITNESS: Only specific to the aquatic  
12 facilities, sir. As far as the whole campground, no, sir.

13 THE COURT: You are familiar with roving patrols as  
14 to aquatic facilities?

15 THE WITNESS: Yes, sir. That's not a common practice  
16 in the industry, nor is it required in this application.

17 THE COURT: Okay. All right.

18 BY MR. HERMESMANN:

19 Q. Under New Jersey's Sanitary Code for a specially-exempt  
20 facility, what's the expectation regarding parental  
21 supervision at a lake such as this one?

22 A. Exactly what it would be at your backyard pool. The  
23 parent is responsible for supervising their child at this type  
24 of home extension.

25 Q. And under the Pine Haven written rules and regulations,

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1 what's the expectation regarding parental supervision?

2 A. Again, the requirement is for parental supervision when  
3 children under the age of 16 are at the swimming pool or at  
4 the swimming lake.

5 Q. Any indication that Mr. and Mrs. Miller were not aware of  
6 that?

7 A. No, sir. Mr. Miller testified that he was aware of the  
8 rules.

9 MR. HERMESMANN: Thank you. That's all I have.

10 (RECROSS-EXAMINATION OF MARIA BELLA BY MR. VESPER:)

11 Q. Now, you understand Mr. Miller is no longer a party in  
12 this case.

13 THE COURT: No, no. Stop that.

14 BY MR. VESPER:

15 Q. Is Mr. Miller --

16 THE COURT: Mr. Miller has nothing to do with this  
17 case.

18 MR. VESPER: Then why -- the questions have been  
19 asked about Mr. Miller.

20 THE COURT: Yeah, but that's relevant on -- I don't  
21 want to say anything, but it was certainly relevant what the  
22 Millers did or told their children. It has nothing to do with  
23 them having been a party, not been a party. They are not  
24 currently parties to this case.

25 MR. VESPER: Understood.

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1 BY MR. VESPER:

2 Q. Do you -- do you understand, Ms. Bella, that -- or let me  
3 phrase it this way: Do people who go to a campground have a  
4 reasonable expectation, a right to assume that the campground  
5 will enforce its rules?

6 A. That's an interesting question.

7 Q. Can you answer it?

8 A. I believe it would be reasonable for them to expect rules  
9 to be enforced.

10 Q. Right. And is it reasonable for anybody that goes to a  
11 campground to be required to follow their children at all  
12 times, like -- let me back up.

13 Is there a difference between supervision and direct  
14 supervision?

15 A. Yes.

16 Q. Tell the ladies and gentlemen of the jury, what's the  
17 difference between supervision and direct supervision?

18 A. Supervision means generally watching children in an area.  
19 Direct supervision means specifically watching that individual  
20 child in a particularly dangerous environment.

21 Q. Right. It means actually following -- not necessarily  
22 holding on, but you're with the child when you directly  
23 supervise him, you're with that child, aren't you?

24 A. Yes, sir.

25 Q. Now, is it reasonable to assume that -- or back up.

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1 Is it reasonable for the owner/operator of a facility  
2 to assume that at all times, at all times, that -- and under  
3 all circumstances, not just for the water facility, but that a  
4 parent is going to directly supervise their child at all  
5 times? Is that reasonable or unreasonable?

6 THE COURT: For a 14 year old.

7 MR. VESPER: Yeah, for a 14 year old.

8 THE WITNESS: I wouldn't expect that, no, sir.

9 BY MR. VESPER:

10 Q. You wouldn't expect an owner/operator to reasonably  
11 expect that either, would you, if you were advising them as a  
12 safety expert, correct?

13 A. No, sir, I would not.

14 THE COURT: Can I ask you --

15 THE WITNESS: Yes, sir.

16 THE COURT: Did the Millers warn the decedent and his  
17 friend, Anthony, not to go into the water when there was no  
18 parent -- when there was no adult present?

19 THE WITNESS: Yes, sir, the boys were instructed not  
20 to go swimming.

21 THE COURT: Do you know, was it just once or multiple  
22 times?

23 THE WITNESS: I don't know, but I do know that that  
24 instruction was given specifically right before Mr. Miller  
25 left, just a few minutes before the boys went into the lake.

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1 MR. VESPER: Any other questions, Your Honor?

2 THE COURT: No.

3 BY MR. VESPER:

4 Q. Now, the extensive background that you have in  
5 campgrounds --

6 THE COURT: You're supposed to -- he had a very  
7 limited redirect.

8 MR. VESPER: He asked about her background and she  
9 said she had extensive -- I am, I'm trying to limit myself to  
10 what she testified to.

11 THE COURT: All right.

12 BY MR. VESPER:

13 Q. You did testify -- well, His Honor asked you some  
14 questions a little while ago about whether you knew what the  
15 standards were in the campground industry.

16 You said that your expertise is in the aquatic  
17 industry, correct?

18 A. Yes, sir.

19 Q. And as far as what is done by the majority of campgrounds  
20 within the campground industry, you don't have any personal or  
21 professional understanding of what that is, you just include  
22 the campgrounds into the overall aquatic, correct?

23 A. Again, as I explained earlier, it doesn't matter where  
24 you put the aquatic facility. There is an industry standard  
25 of care, whether you're a campground, a restaurant, a hotel, a

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1 municipal complex, that is how I'm answering the question,  
2 based on the aquatic industry standard of care.

3 Q. The aquatic industry, right. But when I asked you on  
4 cross examination about, do you know what the best practices  
5 are of campgrounds that have -- that have aquatic facilities,  
6 you don't know the best practices, do you?

7 A. No, sir, I have not done a survey of campgrounds.

8 Q. That's -- that's what I wanted to get to. The --

9 THE COURT: All right. You got to it. Now go to the  
10 next question.

11 BY MR. VESPER:

12 Q. And the --

13 MR. VESPER: Well, I thank you very much.

14 No further questions.

15 THE COURT: Okay. Thank you very much. You can step  
16 down.

17 MR. HERMESMANN: Judge, we're going to need about ten  
18 minutes to set up.

19 THE COURT: Tell me who the next witness is.

20 MR. VESPER: The economist --

21 MR. HERMESMANN: I thought he was asking me.

22 Dr. Rubin.

23 THE COURT: Okay. How much time do you need?

24 MR. HERMESMANN: Ten, maybe 15 minutes to set up.

25 THE COURT: All right. The next one, this is going



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1 to be presented through videotape, and, although I advise you,  
2 that it has the same force and effect as if it were given in  
3 person.

4 It's just about a minute or two before 10 right now,  
5 why don't we go to 10:15.

6 MR. HERMESMANN: Thank you, Your Honor.

7 MR. CICCOTTA: Thank you, Your Honor.

8 THE DEPUTY CLERK: All rise.

9 (JURY EXITS; 9:59 a.m.)

10 THE COURT: Okay. I will see you all at 10:15.

11 RESPONSE: Thank you, Your Honor.

12 (RECESS TAKEN 10:00 a.m.)

13 THE DEPUTY CLERK: All rise.

14 (JURY ENTERS 10:21 a.m.)

15 THE COURT: Everyone, please be seated.

16 Ladies and gentlemen, our next witness offered by the  
17 defendant is going to be presented by videotape. It was  
18 taken, I guess, late last week.

19 MR. VESPER: Friday, Your Honor.

20 MR. HERMESMANN: Last Friday.

21 THE COURT: Last Friday. And it will be just like it  
22 was done in court. Defense counsel questions the witness on  
23 direct exam, cross-examination by the plaintiff, and so forth.

24 What's important for you to know is that, No. 1, we --  
25 from time to time use this technique when scheduling makes it

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1 difficult for a particular witness to come to court at a  
2 particular time, so that's in his control when we see the  
3 witness.

4 The testimony is under oath and has the same force and  
5 effect as if it were given live, right from this witness stand  
6 and so with that, I'll turn it over to defense counsel.

7 MR. HERMESMANN: Thank you, Your Honor. I'm going to  
8 play Dr. Rubin on videotape.

9 THE COURT: First name?

10 MR. HERMESMANN: Jeffrey. If anyone has --

11 (Videotape played.)

12 THE COURT: Excuse me, could you stop the tape for a  
13 minute? I have to take a slight break, so we will resume,  
14 have the jury go out, I'll be back about ten minutes.

15 (RECESS TAKEN; 11:34 a.m.)

16 THE DEPUTY CLERK: All rise.

17 (JURY EXITS 11:34 a.m.)

18 THE DEPUTY CLERK: All rise.

19 (JURY ENTERS; 11:46 a.m.)

20 THE COURT: Everyone please be seated. My apologies  
21 for the unexpected break.

22 Okay. The videographer can continue.

23 (Videotape played.)

24 THE COURT: Okay. Thank you very much.

25 Counsel, do you have another witness?

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1 MR. HERMESMANN: I do not, Your Honor. Other than  
2 the submission of documents.

3 THE COURT: Yeah, well, we're going to go out,  
4 because I think both sides have documents that are going to go  
5 in.

6 MR. CICCOTTA: Yes, sir.

7 MR. HERMESMANN: Other than that.

8 THE COURT: They have been identified but they  
9 haven't been marked yet.

10 MR. HERMESMANN: We have three.

11 THE COURT: We will go through both sides.

12 MR. VESPER: All right, but there are some  
13 photographs that haven't been yet identified but will be  
14 identified. That's it.

15 THE COURT: Haven't been identified by whom?

16 MR. VESPER: Well, if we need to, we can do this  
17 outside the presence of the jury. We don't have a photograph  
18 of John. We intended to do that, but we were rushing. We  
19 don't have a photograph of John.

20 THE COURT: Do you have one here right now?

21 MR. VESPER: Yes, yes, Your Honor.

22 No, I don't have them here at my fingertips, if we can  
23 do that, it's not necessary.

24 THE COURT: Okay. Well, you have no problem of  
25 putting a photograph of John in.

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1 MR. HERMESMANN: I'd like to see the photograph  
2 before I --

3 THE COURT: Well, obviously, but I'm going on the  
4 assumption that we're talking about a photograph of a 14 year  
5 old boy.

6 MR. VESPER: Right, not the ones in the envelope.

7 THE COURT: No, no, I understand. But you rest then?

8 MR. HERMESMANN: Subject to my documents.

9 THE COURT: Subject to --

10 MR. HERMESMANN: I rest.

11 THE COURT: -- for both sides, we are going to do.

12 Now, do you have any rebuttal?

13 MR. VESPER: I did, but you already ruled on that.

14 THE COURT: What?

15 MR. VESPER: I would, but Your Honor has already  
16 ruled on that issue.

17 THE COURT: Okay. All right. Now, just so the jury  
18 knows what the order of march is, I plan tomorrow morning to  
19 start closings. Okay? And the closings, of course, of  
20 defense, we reversed the order of the openings and the defense  
21 goes first and the plaintiff gives the second closing  
22 argument.

23 I'm then going to read the charge to the jury, which I  
24 know how long that's going to take. That one, I can figure  
25 out. It's probably about 35, 40 minutes. But, obviously, I

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1 can't quite predict the length of the closings. I will -- so  
2 I really don't know whether the jury will start deliberating  
3 tomorrow or whether, between the closings and the charge, we  
4 use up most of the day and the jury will go out Thursday  
5 morning. I just don't know.

6 But -- so it looks like you will get the case for  
7 deliberation, again, at either the end of the day tomorrow or  
8 starting Thursday and we will sit Friday. When I say "sit",  
9 you will be deliberating on Friday, okay? And you will do it  
10 back there.

11 So I think I'm going to send the jury home now, because  
12 we do have things to do, charge conference and things like  
13 that.

14 MR. HERMESMANN: Your Honor, no need for them to  
15 remain, Your Honor.

16 THE COURT: What?

17 MR. HERMESMANN: I said it's certainly from our  
18 perspective, no need for the jury to remain.

19 THE COURT: Yeah, but I don't think they have to  
20 remain here.

21 So again, my profound thanks to the jury and I will see  
22 you tomorrow morning to start the closing arguments at 8:30.  
23 Again, have a safe trip home, and --

24 THE JURY: Don't talk, don't talk.

25 THE COURT: Do not discuss the case with your family,

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1 friends, loved ones, co-employees, space aliens, I can't  
2 forget them, bus drivers, and don't do any manual research or  
3 electronic research on this case. You've got a lot to digest  
4 that you've already heard in here, and so have a very safe  
5 trip home. Go home with my thanks. Come in tomorrow morning  
6 with my thanks, and I'll see you then.

7 THE DEPUTY CLERK: All rise.

8 (JURY EXITS; 12:07 p.m.)

9 THE COURT: Okay, everyone be seated please.

10 My plan is to start the charge conference as soon as  
11 it's convenient for you folks. If you'd like a little break,  
12 you know, that's fine with me, whatever, to go through it.

13 I did receive this morning -- well, it was in one  
14 package, but it was really two different items, in a way.  
15 There was some original charges requested by Mr. Vesper and  
16 then he copied, what I think is right from the charge book.

17 MR. VESPER: And they now have a website, but you're  
18 right.

19 THE COURT: They got it in a website. Most of which  
20 is in my charge, so it's not --

21 MR. VESPER: I didn't -- I may have missed it. I  
22 don't think that the voluntarily assumed duty charge was in.

23 THE COURT: No, that's in -- you have that, but you  
24 have it in the part that you originally drafted.

25 MR. VESPER: I did?

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1 THE COURT: Yes.

2 MR. VESPER: We did, but I --

3 THE COURT: You definitely did, in the first two  
4 pages and you had it twice, I think there were two charges  
5 that went to that. But I'm sorry, you attached from the  
6 website most of which looks like I have, word for word, so I'm  
7 not sure what's at issue there.

8 And so, do you want 15 minutes to just --

9 MR. VESPER: I'd like to offer -- counsel has really  
10 been -- I have to give compliments to Mr. Ciccotta, because he  
11 did all that work, along with my partner Rudy. But we have  
12 the comparative negligence ultimate outcome charge, 7.31, if I  
13 could --

14 THE COURT: Well, I have it in the charge, so...

15 MR. HERMESMANN: Judge, isn't the issue right now  
16 what time we are coming back?

17 MR. VESPER: Yes.

18 MR. HERMESMANN: Can we get into this later? I would  
19 really like 12:45 if that's possible.

20 THE COURT: Yes, first of all, there is a comparative  
21 negligence charge, it's already in there. But we will go  
22 back, and the one that I have in there, is right from the  
23 book. I mean, you know, it's nothing, I -- I'm not a big fan  
24 of creativity in charges. I go for the tried and true, and,  
25 you know, it's been used a hundred times before.

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1           So let's do -- could we do exhibits right now? Can we  
2 get --

3           MR. VESPER: No, we need a few minutes on the  
4 exhibits, I apologize, because we -- I can't find the  
5 photographs, but I will find them. It's just I can't --

6           THE COURT: Well, can we do all the other ones and  
7 then when the photos come, we will mark that one in. We have  
8 about eight or nine here. I just want to go through them.

9           Well, for instance, P-18, which is that big diagram of  
10 the campground -- no, I'm sorry, P-1B, P-1B, it's that big  
11 schematic.

12           MR. VESPER: Right.

13           THE COURT: Not to scale. Are you offering it in  
14 evidence?

15           MR. VESPER: Yes.

16           THE COURT: Any objection?

17           MR. HERMESMANN: Same objection as before, Your  
18 Honor, just regarding scale.

19           THE COURT: Well, I'm -- I think that, given the  
20 testimony, which made it clear where things were out of scale,  
21 I think it's a useful diagram and I'm going to let it in.  
22 Okay.

23 (PLAINTIFF EXHIBIT P-1B WAS RECEIVED IN EVIDENCE)

24           THE COURT: The next was the photo of the whale  
25 fountain. That's P-6. Are you offering P-6?



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1 MR. VESPER: Yes, Your Honor.

2 MR. HERMESMANN: I am objecting.

3 THE COURT: I'm going to allow it in.

4 MR. HERMESMANN: Judge, what's the relevance of this  
5 whale? I mean, the kids -- all the kids have testified --

6 THE COURT: Shows the lake. Hey, look. As Tennyson  
7 said, the Assyrian came down like the wolf in the fold.

8 If he tries to make an argument that isn't supported by  
9 the evidence about the whale, he's going to regret the day he  
10 did it.

11 MR. CICCOTTA: Your Honor, may I say --

12 THE COURT: On the other hand --

13 MR. CICCOTTA: Your Honor, may I say, I think we may  
14 be forgetting there was very clear testimony from Anthony  
15 Dioscon that John, the deceased, was very interested and very  
16 drawn to that whale.

17 THE COURT: That night, nobody stopped at the whale.  
18 The two people who went didn't stop at the whale, there was no  
19 discussion when they went in.

20 MR. VESPER: We agree. Nobody stopped at the whale  
21 but it was John's -- here's what you're cutting off. You're  
22 cutting off the right of the plaintiff to explain that John  
23 intended to swim to the whale. There's no doubt -- I agree  
24 with what you just said. What you just said is perfectly  
25 correct in -- but it has to be put in context. Nobody swam to

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1 the whale. However, John had expressed an interest to swim to  
2 the whale, which -- come on, it's --

3 THE COURT: What does that got to do with what  
4 happened that night, with whether -- what does that have to do  
5 with whether there were adequate -- well, I will, if all  
6 you're going to say is -- you'll say it expressed an interest  
7 in swimming to whale.

8 MR. VESPER: That's it.

9 THE COURT: But if you get into what's clearly  
10 attractiveness, I'm not going to allow it. This case is not  
11 an attractive nuisance case.

12 MR. VESPER: You told me in chambers and I think also  
13 on the record, never put those two words together, never in  
14 this case, attractive and nuisance. I haven't done that.

15 THE COURT: No, you haven't. I agree. And I'm not  
16 arguing with you on that.

17 MR. HERMESMANN: He certainly described it as an  
18 attraction.

19 MR. VESPER: I did not.

20 MR. HERMESMANN: He hasn't utilized the word  
21 nuisance.

22 MR. VESPER: She said amenity. Emphatically she said  
23 --

24 MR. HERMESMANN: I would appreciate when I speak, if  
25 I could just finish my sentence and I will certainly give the

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1 same courtesy to Mr. Vesper.

2 MR. VESPER: I apologize.

3 MR. HERMESMANN: The word "attraction" has been used,  
4 I'm going to estimate five times.

5 THE COURT: Okay.

6 MR. HERMESMANN: And the record will bear it out.

7 THE COURT: If there's -- there's nothing in this  
8 case, that in my view that suggests that the presence of the  
9 whale increased the risk of drowning, but -- so that's fodder  
10 for you when you close this.

11 MR. HERMESMANN: Well, I don't get to go after him.

12 THE COURT: No, no, I will let you. If he tries to  
13 make it -- what -- even if he doesn't use the words attractive  
14 nuisance, if he tries to tie the risk of drowning to that  
15 whale, I'll give you a rebuttal.

16 MR. HERMESMANN: Thank you, Your Honor.

17 MR. VESPER: I believe --

18 THE COURT: I'm telling you, that's not in this case.  
19 It really isn't.

20 MR. VESPER: And I respectfully disagree, but I'll  
21 follow the Court's -- I'm going to follow the Court's order  
22 despite the fact that I believe that there is enough evidence  
23 for any reasonable person to conclude that if you have an  
24 amenity, as the aquatic expert said, you have a water amenity  
25 and within that amenity, you have an amenity, and that other

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1 amenity is this whale.

2 THE COURT: But that has nothing to do with the  
3 drowning. If anything, the presence of that little thing in  
4 the center reduces the risk of drowning because that's the  
5 place that you could stop in the middle of your swim.

6 MR. VESPER: In the middle of the 15-foot lake,  
7 that's in the deepest part of the lake.

8 THE COURT: Yeah, but if you were going across the  
9 lake, as the two kids did in this case, and suddenly you were  
10 floundering, you would have a place to grab onto.

11 MR. VESPER: Your Honor has already ruled. I'll  
12 follow Your Honor's ruling, despite my --

13 THE COURT: Okay. I'm going to let the picture --  
14 I'm going to let the picture in.

15 MR. VESPER: I know that. I'm just saying, I'm going  
16 to follow your ruling but I've made my exception to your  
17 ruling.

18 THE COURT: Okay.

19 MR. VESPER: I'm only going to refer to it as the  
20 amenity that the aquatic expert said was there.

21 THE COURT: We will have to get three circuit judges  
22 who are swimmers and they'll -- we will see what they say.

23 MR. VESPER: I would prefer three circuit judges who  
24 not only swim, but have children.

25 THE COURT: Oh, well, some of them definitely do.

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1 MR. VESPER: I'm sure.

2 THE COURT: I could tell you that.

3 (PLAINTIFF EXHIBIT P-6 WAS RECEIVED IN EVIDENCE)

4 THE COURT: Okay. The photos of D-39, now that would  
5 be defense exhibit. Are you offering that?

6 MR. HERMESMANN: I am. That's the blowup of the --

7 MR. VESPER: No objection.

8 THE COURT: Okay. That will be in evidence.

9 (DEFENDANT EXHIBIT D-39 WAS RECEIVED IN EVIDENCE)

10 THE COURT: P-3. I just have the words pre-2010.

11 What is P-3?

12 MR. VESPER: We don't know.

13 THE DEPUTY CLERK: I have it down as a brochure.

14 MR. VESPER: Oh, that's the -- thank you very much.  
15 The brochure of the Pine Haven.

16 THE COURT: Is it like a small version of the big  
17 blowup?

18 MR. VESPER: It's a small version, yes. It's the  
19 color --

20 THE COURT: It includes, at least, that drawing in  
21 miniature.

22 MR. VESPER: It does, it includes that drawing in  
23 miniature.

24 THE COURT: Okay. Are you offering it -- I assume  
25 you're offering it.

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1 MR. VESPER: Yes, Your Honor.

2 THE COURT: Any objection?

3 MR. HERMESMANN: I would just like to see it, Your  
4 Honor. I think it's more than just that blowup.

5 THE COURT: It is, I said it has that, and it has  
6 other text in it. We should have it.

7 MR. VESPER: Here it is. No, you don't have it. We  
8 found it. It wasn't in evidence.

9 MR. HERMESMANN: I don't think it was utilized, Your  
10 Honor, so I'm not sure of the relevance of it.

11 THE COURT: Well, it shows what they saw, you know,  
12 when they were going through the process of selecting a  
13 campground. I'm going to allow it.

14 (PLAINTIFF EXHIBIT P-3 WAS RECEIVED IN EVIDENCE)

15 THE COURT: D-1 is the photo of the lake. It's a  
16 defense exhibit.

17 MR. HERMESMANN: We are moving that into evidence.

18 THE COURT: Any objection?

19 MR. VESPER: No objection.

20 THE COURT: Okay. D-1 in evidence.

21 (DEFENDANT EXHIBIT D-1 WAS RECEIVED IN EVIDENCE)

22 THE COURT: Now, the next one is the -- it's an  
23 inspection certificate, I think that's the word, it was D-40,  
24 and it was by the Cape May County Department of Health, I  
25 believe.

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1 MR. HERMESMANN: It's already in evidence.

2 MR. VESPER: Over my objection, but you ruled.

3 THE COURT: You're right, it is in evidence. I even  
4 have it here in evidence. See, I do have that.

5 Okay. Next one is D-41 which is a signage photo.

6 MR. HERMESMANN: We are moving that into evidence.

7 MR. VESPER: No objection.

8 THE COURT: Okay.

9 (DEFENDANT EXHIBIT D-41 WAS RECEIVED IN EVIDENCE)

10 THE COURT: Can I please have the -- that's D-41.

11 The next is D-17, which I think is what I have right  
12 here, it's the Pine Haven rules and regulations and it was  
13 marked originally Jordan 8 or something like that, but I think  
14 we gave it the number of D-17.

15 MR. HERMESMANN: And do you have all three pages,  
16 Your Honor?

17 THE COURT: I have here one -- come on, two, three.

18 MR. HERMESMANN: We're moving that into evidence.

19 MR. VESPER: No objection.

20 THE COURT: Okay. Pine Haven rules and regs in  
21 evidence.

22 (DEFENDANT EXHIBIT D-17 WAS RECEIVED IN EVIDENCE)

23 THE COURT: The next -- this is funny, I have P-5,  
24 which would be you, Mr. Vesper, Page 1 of the Pine Haven  
25 brochure. Is that duplicative of what's already there? You

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1 marked it.

2 MR. CICCOTTA: It may be a duplicate.

3 MR. VESPER: That's probably a duplicate.

4 THE COURT: So I don't have to.

5 MR. CICCOTTA: We won't need that.

6 MR. VESPER: We won't need that.

7 MR. CICCOTTA: Now that you have the full brochure  
8 admitted, we won't need that.

9 THE COURT: Yeah. Now, I have another P-3, brochure  
10 for Pine Haven, and we also have it already in evidence as --  
11 oh, P-3 is here twice, so we don't need it a second time.  
12 It's in once.

13 MR. VESPER: Right.

14 THE COURT: Okay. Okay. The diagram by Ms. Wheeler,  
15 I have as D-42.

16 MR. VESPER: No objection.

17 THE COURT: Okay. You're offering it, I assume,  
18 Counsel? Counsel?

19 MR. HERMESMANN: Yes, Your Honor, I am.

20 THE COURT: Okay. Then D-42 is in evidence.

21 (DEFENDANT EXHIBIT D-42 WAS RECEIVED IN EVIDENCE)

22 THE COURT: And the last one was a Pine Haven video.

23 MR. VESPER: That was P something.

24 THE COURT: It's -- it is P something, yes. It was  
25 P-36, actually.



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1 MR. VESPER: There was no sound, because the way it  
2 was explained to me, prior to her testimony, was that she had  
3 seen what was on the video, as it developed, she saw pictures,  
4 but not the actual video. But now that the jury has seen the  
5 pictures that are in the actual video, but not listened to it,  
6 perhaps -- unless the sound could be taken out, we shouldn't  
7 even admit it into evidence.

8 THE COURT: Well, I don't know -- if you're not  
9 moving it, I have no problem -- if that finishes the -- he's  
10 not moving it, so...

11 MR. HERMESMANN: In fact, Your Honor, I'd like this  
12 jury instructed -- a curative instruction that they should  
13 ignore whatever they saw on that video. The offer of proof,  
14 if I could, the offer of proof was that this witness was going  
15 to get on the stand and testify that she reviewed this video  
16 before she ever went to the campground. That was the offer of  
17 proof.

18 I represented to the Court that it was then made in  
19 2013. The witness then gets on the stand, the question is,  
20 have you ever looked at the website? She said, yes. I  
21 objected as to foundation when the plaintiff then moves to  
22 show the video. The foundation was never met and this jury  
23 ought to hear that.

24 MR. VESPER: I believe the foundation was met in this  
25 regard: We believed from what she was telling us, and it was

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1 coming in in dribs and drabs that she saw the pictures on the  
2 video. She was referring to the website.

3 Now, the fact that we showed a moving picture of the  
4 pictures that she saw, does that -- did that prejudice the  
5 defense at all? You haven't heard one word that anything they  
6 saw in any way prejudiced that. And here's why, because the  
7 moving pictures were the same things that she saw on the  
8 two-dimensional thing.

9 THE COURT: Save your oxygen. The -- I'm going to  
10 let it in, but what --

11 MR. VESPER: No, no, he didn't move it in.

12 MR. HERMESMANN: I didn't move it in.

13 THE COURT: Then he's not moving it in.

14 MR. HERMESMANN: No, he wants a curative instruction.  
15 It never should have been shown.

16 MR. VESPER: Well, that was very succinct. Did I  
17 respond to --

18 THE COURT: Okay, No. 1, I'm not putting it in  
19 evidence because he's not moving it into evidence. That's  
20 simple.

21 MR. VESPER: Right.

22 THE COURT: As to a curative instruction, I didn't  
23 see anything in that movie that would prejudice the jury, and  
24 I'm not going to give a curative instruction, and I think that  
25 would serve only to confuse the jury rather than elucidate.

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1 MR. HERMESMANN: The plaintiffs, through counsel,  
2 they think it's important to show the video. What the reason  
3 is, I don't know. That's not for me to get inside their mind  
4 to do so.

5 THE COURT: Well, he can't refer to it. He hasn't  
6 moved it into evidence, so he can't refer to it, it's not in  
7 evidence.

8 MR. VESPER: Right, I'm not going to refer to it.

9 THE COURT: He can't refer to it, he can't. And I  
10 did see -- I was here when it was played. I think I was.  
11 Have I been on the bench most of the time?

12 MR. CICCOTTA: You've been here, Judge.

13 MR. VESPER: You've been here most of the time.

14 THE COURT: Judge Wiener -- I tell you, Judge Wiener,  
15 he used to go off the bench. He'd let the case go on, he'd be  
16 trying a case and he went off the bench to do something else.  
17 Charlie.

18 But I'm not going to give a curative instruction.  
19 Look, if you can point to something to me that you think is  
20 prejudicial, I may reconsider. But right now, from my own  
21 memory, I don't see anything that would confuse the jury or be  
22 unfair. That covers everything that so far we have. Yes --  
23 except for photos.

24 MR. VESPER: Right.

25 THE COURT: And as I say, so long as we have a plain,

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1 ordinary, I mean, not prejudicial photo of any kind, I think  
2 the jury is entitled to have a sense of what he looked like.

3 MR. VESPER: There's two sets of photographs.

4 THE COURT: Do you have them?

5 MR. VESPER: Yes.

6 THE COURT: Oh, you found them.

7 MR. VESPER: Oh, no, we didn't. But here's the two  
8 sets.

9 THE COURT: Why do we need sets?

10 MR. VESPER: There's one set of John, there's three  
11 photos. John at a birthday party, John showing his hand, in  
12 part, and John with, I think, with his mom, and that's --  
13 that's the three photos.

14 THE COURT: Well, I have to see those.

15 MR. VESPER: I know you do, and so does Counsel.  
16 Counsel has to see them. Then there's another set -- well,  
17 these are that in the envelope.

18 THE COURT: Well, that's the autopsy.

19 MR. VESPER: P-35 that you said you would rule on,  
20 and three of the experts that testified relied on them.

21 THE COURT: I'm not going to admit the autopsy  
22 photos, not a chance, but...

23 MR. VESPER: I'm not going to show them, but  
24 shouldn't the jury have the chance --

25 THE COURT: That doesn't help them on any issue in

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1 this case. All it does is inflame them.

2 MR. HERMESMANN: There's a difference between  
3 reviewing them and relying on them. None of the experts  
4 indicated that they relied upon those photographs to reach  
5 their opinions.

6 THE COURT: I will -- though I do want to rule on the  
7 other photos, but -- when will we have those?

8 MR. VESPER: If you just -- if I may have a moment,  
9 Your Honor.

10 There's one -- this was taken only about a month prior.  
11 This is a birthday photograph.

12 THE COURT: Can I see it?

13 MR. VESPER: This has got -- it's got the holes in  
14 it. Where is the original? We would like to find the  
15 photographs that have no holes punched in them.

16 THE COURT: Well, I'll substitute them should you  
17 find them.

18 MR. VESPER: Right. But that's the closest in time  
19 that we have to --

20 THE COURT: Who is the --

21 MR. VESPER: -- death.

22 THE COURT: Who is the young lady in the picture?

23 MR. VESPER: That's his sister.

24 THE COURT: That's his sister?

25 MR. VESPER: Who has testified, Odalie.

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1 THE COURT: Yeah. Do you have any others?

2 MR. VESPER: Right. And the other two, one --

3 THE COURT: Have you shown them to counsel?

4 MR. HERMESMANN: I haven't seen them.

5 MR. VESPER: Sorry.

6 THE COURT: Here's the birthday party. Here's --

7 MR. HERMESMANN: I might have seen them at some  
8 point.

9 MR. CICCOTTA: These were referenced in the pretrial  
10 order. These were referenced in the trial exhibits that  
11 Mr. Hermesmann and I --

12 MR. HERMESMANN: I'm not saying I've never, ever seen  
13 these photographs.

14 MR. VESPER: I know, I know.

15 MR. HERMESMANN: I'm not saying I haven't seen them  
16 in this context that they're being offered.

17 THE COURT: You guys could argue on who should march  
18 in a one-man parade.

19 MR. HERMESMANN: I vote for Mr. Vesper.

20 MR. VESPER: Hey, I have to follow the general's  
21 orders once the -- and the judge. Everybody here outranks me.

22 THE COURT: Actually, I think the warrant officer is  
23 the coolest rank of all.

24 MR. VESPER: Here's the finger.

25 THE COURT: And this one is his mother? The woman

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1 he's hugging?

2 MR. CICCOTTA: No, that's an aunt.

3 THE COURT: And what's the other one?

4 MR. VESPER: Well, and then the final photograph has  
5 been marked P-17. This shows the fingers and his mom, or the  
6 side of his mom.

7 MR. HERMESMANN: Are these the fingers?

8 MR. VESPER: Yeah. These are the fingers that --

9 MR. HERMESMANN: Truth is, I have an objection to all  
10 three, but I will wait until we're done.

11 THE COURT: Can I see it? I haven't seen it.

12 MR. VESPER: Sure.

13 THE COURT: All right. Counsel, would you like to  
14 see them? Would you like to have them in your hands?

15 MR. HERMESMANN: I would.

16 THE COURT: Okay. I'm going to call them, by the  
17 way, 17A, 17B and 17C.

18 MR. HERMESMANN: Your Honor, I concur that the  
19 plaintiff is permitted to put in a picture of the plaintiff so  
20 this jury has an idea of who -- what John Toribio looked like,  
21 the individual we've been talking about for the last week and  
22 a half.

23 I do not concur that he should be permitted to put in a  
24 photograph of himself being hugged by his sister, another by  
25 an unknown aunt, and to the extent that the third photograph

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1 is meant to show his hand, my suggestion would be that we crop  
2 out the other individual, whoever she may be, and then allow  
3 it to go in in that fashion.

4 MR. VESPER: Since when is a plaintiff limited to one  
5 photograph? I never heard that rule before. I've seen  
6 scrapbooks come in, not that that would happen here, but  
7 here's the point: One photograph shows him --

8 THE COURT: Don't argue that point. There is no --  
9 there is no one photo rule that I'm aware of.

10 MR. VESPER: Right. So we have a photograph of him  
11 --

12 THE COURT: Don't argue that point.

13 MR. VESPER: All right. We have a photograph that  
14 shows him very close in time to his death. We have another  
15 photograph that shows some scale, him, and they've already met  
16 Odalie, and now we have a photograph that now the defense  
17 wants cropped? Why, because it shows his mom? That doesn't  
18 prejudice anybody. This photograph shows the hand that  
19 Dr. Manion made such a big issue about that contributed to his  
20 drowning. There it is. His hand is in the photograph and you  
21 could see the deformity is two shortened fingers.

22 THE COURT: How does it relate to the duties and  
23 obligations of the --

24 MR. VESPER: It doesn't relate to the --

25 THE COURT: -- Pine Haven that --



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1 MR. VESPER: It relates to what they've heard. The  
2 jury heard their expert. I didn't make it an issue, their  
3 expert, Dr. Manion said, that the deformed hand contributed to  
4 the drowning. I want, in my summation, to show the jury how  
5 ridiculous that Doctor was. Look at the hand.

6 MR. HERMESMANN: Actually, plaintiff did make an  
7 issue because it did not come out on his direct examination,  
8 it came out during his cross-examination.

9 MR. VESPER: That is not true. That is absolutely --  
10 and I'm not saying that he said that intentionally. That is  
11 totally incorrect. It came out in his direct. Otherwise, I  
12 was not going to deal with it in cross. I dealt with it in  
13 cross, if you remember, and then he wouldn't answer even your  
14 question.

15 I mean, I said to him, are you -- you're telling me the  
16 deformity contributed to drowning? Yes. How big was the  
17 deformity? I don't know. I mean...

18 MR. HERMESMANN: Your Honor, if I could. I didn't  
19 object to the picture of the hand.

20 MR. VESPER: Oh, good.

21 MR. HERMESMANN: I objected to the mother being part  
22 of the paragraph.

23 MR. VESPER: Right.

24 MR. HERMESMANN: That's the basis for the objection.

25 MR. VESPER: If one could take the mother out of the

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1 photograph, that's -- and there's a reason for that?

2 THE COURT: Anything else?

3 MR. HERMESMANN: I guess my question is, what's the  
4 reason of having the mother in the photograph? That's  
5 probably the more poignant question.

6 MR. VESPER: Yeah, that's his mother, she's the  
7 plaintiff, and again, this goes to -- is this too cumulative,  
8 a third photograph? I urge the Court to see that we've been  
9 reasonable in our selection.

10 THE COURT: You know, one thing I've learned over  
11 many years, 50, being a lawyer, every piece of evidence can  
12 favor both sides, depending on how it's spun, okay? To the  
13 extent that it's shown that he was a very well-behaved boy  
14 with his mother, you know, did what she wanted, if you can't  
15 figure out how that's a negative factor for the plaintiff,  
16 you're not as smart as I think you are.

17 And you want that out?

18 MR. VESPER: No. I want it --

19 THE COURT: You want it in, I mean?

20 MR. VESPER: In, yes.

21 THE COURT: All right. I'm going to leave it in.

22 MR. VESPER: Thank you.

23 THE COURT: I'm going to admit all three of them.

24 Let's have them, 17A -- let me take these until you get the  
25 better ones.

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1 MR. VESPER: Right.

2 THE COURT: Let me have those until --

3 MR. VESPER: Thank you, Your Honor.

4 (PLAINTIFF EXHIBITS P-17A, P-17B and P-17C WERE RECEIVED IN  
5 EVIDENCE)

6 THE COURT: And as I say, if you can get ones without  
7 holes, you know, or something in the sides, I will --

8 MR. VESPER: Then we have -- because I have to show  
9 counsel, but I can't find them, we have aerials of the camp,  
10 showing the camp looking -- an aerial view looking down

11 showing the entire camp and an aerial close-up of the lake --

12 THE COURT: When was that done? I never heard about  
13 that one.

14 MR. VESPER: No, we didn't mark them. But I would  
15 like to have them marked and represent to the Court, we can  
16 certainly link them up, but they show more of the --

17 THE COURT: Can I see it?

18 MR. VESPER: Sure. This is the close-up. I can't  
19 find the one of a distance, distance shot.

20 This was premarked P -- yeah, here they are, we found  
21 them. It's P-8A, B and C, just to show scale.

22 THE COURT: Can I see them?

23 MR. VESPER: Yes. Can we have that other photo back,  
24 please.

25 This, I think, both -- yeah, I think both. I think all

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1 three photographs would help the jury to better understand the  
2 scale, which the diagram does a pretty good job, but now, if  
3 they really want to see what a hundred feet looks like for the  
4 -- for the width of the shore line or the distance to the  
5 basketball court, it's -- it orients them and it brings them  
6 into clear --

7 THE COURT: And you think this helps you?

8 MR. VESPER: Yes.

9 THE COURT: Something that emphasizes how small the  
10 lake is helps you?

11 MR. VESPER: Yes, Your Honor.

12 THE COURT: I guess -- what do I -- what do I know.  
13 Show it to -- show this one to -- well, show all three of them  
14 to counsel.

15 MR. VESPER: Right. Because if you recall, in the  
16 beginning, not now, because it's already in, there was a big  
17 issue made about the scale of the diagram. It's not an issue  
18 anymore, but just in case somebody on the jury wants to see,  
19 it's for scale, here's for scale.

20 MR. HERMESMANN: The objection is as to foundation.  
21 I mean, if we're going to take a document that no witness has  
22 referred to, there's been no reference to it and I haven't had  
23 a chance to counter it, some of it, actually, I just picked  
24 out a real quick one that's not accurate as to how the camp  
25 was in 2008, so -- or 2010.

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1 THE COURT: '10.

2 MR. HERMESMANN: From a foundational perspective, I  
3 believe it's improper.

4 THE COURT: You may find this strange, I think I'm  
5 helping Mr. Vesper. I'm not going to admit those. I have to  
6 -- how can I explain to the jury that I need testifying as to  
7 what those things show and what they represent, when they were  
8 made. You say they're to scale, maybe they are to scale, I  
9 don't know, but I don't see -- I see a minuscule probative  
10 value and I see no witness that could -- the only thing it  
11 does show to me is how small the lake is, but that's -- I call  
12 it the lake, the swimming lake.

13 All right?

14 MR. CICCOTTA: If Your Honor --

15 THE COURT: That's taking care of the evidence.

16 P -- do you have numbers on those, by the way?

17 MR. VESPER: We did. It was P-8A, P-8B, P-8C and  
18 there is -- my co-counsel reminded me, there was a chart that  
19 Professor Tinari redid.

20 THE COURT: Well, he can rely on things not in  
21 evidence. An expert doesn't have to -- he's not limited to  
22 relying on things in evidence. You know that.

23 MR. VESPER: We would ask that the -- Professor  
24 Tinari's chart, with the four columns, this has to be marked,  
25 but we would ask that this go into evidence.

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1 MR. HERMESMANN: I would object. I believe it can  
2 be --

3 THE COURT: Yeah, I never heard of a chart prepared  
4 by a witness -- you know, you can, when you're doing your  
5 closing, you know, create a chart and you can write numbers  
6 down that you think -- you can say, for this category, it's  
7 this.

8 MR. CICCOTTA: That's our intention.

9 THE COURT: It might well duplicate most of that, if  
10 not all of that.

11 MR. CICCOTTA: That's what --

12 THE COURT: That's different, that's not evidence.

13 MR. CICCOTTA: And that's exactly, Your Honor, what  
14 we've done.

15 THE COURT: But everybody does it.

16 MR. VESPER: Yes.

17 THE COURT: I mean, when we have damage cases, it's  
18 very common, you put the elements and you write each one.  
19 Now, one little thing I'm going to point out to you, normally,  
20 in the standard charge, funeral expenses are compensable.

21 MR. VESPER: We're not introducing that.

22 THE COURT: I know. That was my point. Is it -- I  
23 heard no testimony as to -- as to funeral expenses. So I just  
24 want you to know I'm taking that out of the charge.

25 MR. VESPER: Thank you, Your Honor.

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1 THE COURT: Okay. Now, when do you want to have the  
2 charging conference? I'm free till 3 o'clock and then I have  
3 to give somebody more months in jail than you care to  
4 consider.

5 MR. HERMESMANN: I'm requesting 1:15, Your Honor.

6 THE COURT: Is that okay with you?

7 MR. VESPER: Yes, Your Honor.

8 THE COURT: Okay. Then we will meet in my chambers.  
9 By the way, did you get a copy of what he gave you?

10 MR. HERMESMANN: I did.

11 THE COURT: Okay.

12 MR. HERMESMANN: Well, assuming we got the same  
13 thing.

14 THE COURT: Well, I'm assuming he did.

15 MR. HERMESMANN: I didn't review your copy.

16 MR. VESPER: Come on, Joe.

17 THE COURT: Hope springs eternal. So I am hoping  
18 that's the case.

19 MR. HERMESMANN: I'm certain we got the same thing.

20 THE COURT: All right. To orient you to one thing,  
21 though, just so you're not shocked by it, I believe that *Green*  
22 *v. Bittner* does allow the deduction of the costs. In other  
23 words, it didn't reverse the old law. All it did was create a  
24 whole new category of compensable. Because as the Court  
25 actually said, you know, people were resorting to various

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1 fictions to give damages, and they thought by creating this  
2 new category of damages, there would be recovery, but it could  
3 be recovered by plaintiffs, consistent.

4           On the other hand, I want to alert you to one thing  
5 here, that -- and it goes -- kind of goes Mr. Vesper's way.  
6 In the *Green v. Bittner* case, and many cases, you have a  
7 family, let's say, a husband and wife. They're both claimants  
8 under the Death Act, they're both claiming a piece of the pie  
9 and they both contribute to the upbringing. In that case,  
10 reducing the damage by that cost of finishing the upbringing  
11 of the child to age 18 or age 21 makes some sense.

12           This case, and I'm going to allow argument on it, is a  
13 little different. We have the boy's natural father, who is  
14 married, who has -- his own wife, and we have Mrs. Toribio's  
15 current husband, and so far as I can tell, there's testimony,  
16 and even that all three contributed, to some degree, to his  
17 costs. But it wouldn't be fair to deduct anything that either  
18 of the men, either the natural father or the stepfather  
19 contributed, because they're not claimants against the fund.  
20 They're not seeking part of the fund, only the mother.

21           The father, who might have, has waived it and the other  
22 one, I don't think under any circumstances would have had a  
23 claim.

24           Well, I hope you follow what I'm saying, that it's one  
25 thing --



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1 MR. VESPER: Yeah.

2 THE COURT: -- to argue for a deduction when the  
3 people who are claimants to the fund are the ones paying the  
4 money out.

5 But when I have two people, and even the father has  
6 said, somebody that was giving -- was paying money, there was  
7 numbers somewhere, was paying money for -- and certainly,  
8 there's every indication that his current stepfather, in other  
9 words, his mother's current husband is also contributing.  
10 He's a working man. He's contributing to the support of the  
11 family, and neither one of those two are claiming the fund.

12 And I'm going to allow argument on that. I mean, while  
13 I think Mr. Vesper is wrong to say that *Green v. Bittner*  
14 changed the old rule, because I think actually the reverse, I  
15 think it affirmed the old rule. But, this particular case is  
16 very unique, in that we have two people who both have been  
17 identified, has provided some support for the child, neither  
18 of whom is a claimant to the fund, the would-be fund, the  
19 damage claim. And I think that's significant.

20 Now, one thing that -- and I'm going to let -- each  
21 side can argue that, as they want. I mean, Mr. Vesper can  
22 argue it and defense counsel can argue it. So that's fine.

23 But I notice that -- now *Green v. Bittner*, what, is 30  
24 years old now, something like that?

25 MR. HERMESMANN: 30, 35 years.

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1 THE COURT: 30 years -- what?

2 MR. HERMESMANN: 35 years old.

3 THE COURT: 35, 1980?

4 MR. HERMESMANN: 1985 case.

5 THE COURT: *Green v. Bittner* is 35 years old and the  
6 standard, let's call it the book charge in the New Jersey  
7 standard charges doesn't charge one way or the other as to the  
8 deductibility. Just doesn't charge it, and I'm not going to  
9 charge it.

10 I'm going to let it be argued, I'm going to let it be  
11 argued and I've indicated to you the kind of wrinkle that  
12 there is here, or wrinkles. But I'm not going to charge it.  
13 I'm not going to add a charge that 300 times has never been  
14 given, to my knowledge. So I think the jury can figure it out  
15 and we'll go from there.

16 So I just wanted to put that on the record before you  
17 came in here, because that's been a big issue, in a sense  
18 throughout the case, and I disagree, again, with Mr. Vesper on  
19 one point, but I also disagree with the expert, which suggests  
20 that somehow or another the cost of upbringing is  
21 automatically deductible when two of the three people  
22 providing it are not -- are not claiming to the fund. I sound  
23 like an estate lawyer, the fund.

24 That's what my old partners at Woodruff English, they  
25 like the fund, because they thought they would get their hands

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1 on it and usually did. At one point, a Chancery Judge in  
2 Newark came in for a fee application. The Judge looked up and  
3 said, are you a residuary beneficiary of this estate?  
4 So...but you all know what I mean. Okay. I will see you at  
5 1:15.

6 MR. VESPER: Thank you, Your Honor.

7 MR. HERMESMANN: Yes, Your Honor.

8 (RECESS; 12:46 p.m.)

9 THE DEPUTY CLERK: All rise.

10 (OPEN COURT; 3:37 p.m.)

11 THE COURT: Okay. Everybody, it's about 25 of 4 on  
12 Monday. For like the last two hours or so, we have been  
13 having a charge conference --

14 MR. VESPER: Massive two and a half.

15 THE COURT: Two and a half. We won't quibble among  
16 friends.

17 MR. VESPER: None of that was pointed out to me. I  
18 said we all thank you for the time and patience.

19 THE COURT: Two and a half hours going over the  
20 charge and the verdict sheet. I had marked as C-1, I think,  
21 and C-2, that is Court 1 and Court 2, the original version  
22 that I distributed to the parties prior to the charge  
23 conference, and we've since gone over that.

24 What I'm going to do now is, I'm going to go through  
25 both the jury charge and the -- and set forth what I believe

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1 we have agreed to, but to make sure we're all on the same  
2 page, and then if either party has objections in the sense  
3 that they think there are things I should have included or  
4 should not have included that they want to object to, they can  
5 put their objections on the record, and for whatever it's  
6 worth, after I give the charge, I'm going to call you to  
7 sidebar and ask, does anybody object.

8 Now, you can say, just incorporate all the objections I  
9 made in the past. However, if in hearing it, there's a new  
10 objection that occurs to you that you didn't think of now, I  
11 won't bar you -- I won't claim that you didn't have an  
12 opportunity, because I believe when you hear it orally, there  
13 may be something about the charge that you object to that you  
14 didn't think of now, so don't worry if you -- that by not  
15 saying anything now, you're like permanently waiving, because  
16 I do give you another chance to object.

17 In other words, my object is to not to get you to waive  
18 things. I think the Circuit should be made busy, and I think  
19 it's good for them and -- okay?

20 Now, let's start with the charge. I have nothing on  
21 Page 1, nothing on Page 2, nothing on Page 3, nothing on  
22 Page 4, nothing on Page 5, nothing on Page 6.

23 Now, on Page 7, where it says: Questions are not  
24 evidence, we're going to add the word, on the very first line  
25 of Paragraph 5, the words, "or the Court" after "counsel."

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1 Do you see that?

2 MR. VESPER: Yes, Your Honor.

3 MR. HERMESMANN: Yes, Your Honor.

4 THE COURT: Okay. All right. And I think both sides  
5 agree to that.

6 Nothing on 8, nothing on 9, nothing on 10, nothing on  
7 11, Page 11, nothing on Page 12, nothing -- no.

8 On Page 13, we're changing, to get the right names.

9 I'm taking out Kucsma, Duval, Thomas Cate. Those three, I'm  
10 taking out, because they didn't testify.

11 MR. CICCOTTA: Yes, Your Honor.

12 THE COURT: Okay. So I'm going to cross those names  
13 out.

14 MR. VESPER: I have one -- do I make my objections  
15 now or are you simply -- you're going to run through and then  
16 we get up.

17 THE COURT: Yes, just make a note for yourself.

18 MR. VESPER: I will. Thank you, Your Honor.

19 THE COURT: Okay. Now, on Page 14, there's a fair  
20 number of changes. First of all, in the first section, which  
21 is 13. Three lines from the bottom of 13, where it says,  
22 "with regard to their operation or maintain," you have that?

23 MR. VESPER: No. Where is it?

24 THE COURT: Three lines from the bottom, sentence  
25 begins: Defendants deny any negligence with respect to the.

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1 MR. VESPER: Oh, yes, I have it.

2 THE COURT: Operation or maintenance, and after -- on  
3 the second line, after the word, "standards."

4 Do you see that?

5 MR. VESPER: Yes, Your Honor.

6 THE COURT: Relating to lighting, signage, time of  
7 use or employee patrols, and that -- so forth. Okay?

8 MR. VESPER: And my sole objection to that, it should  
9 read, should -- did not breach any industry standards to  
10 include. I don't want them to be limited just to that,  
11 because there's been other comments and testimony --

12 THE COURT: All right. I don't mind putting -- I'm  
13 going to do that, "to include." That's okay.

14 MR. VESPER: Why don't we just say: To include but  
15 not be limited to. Because we criticized this entire  
16 operation of this lake as being almost nonexistent.

17 THE COURT: Well, that's something he would want.  
18 You don't mind that.

19 MR. HERMESMANN: I don't mind.

20 THE COURT: No, I'm talking --

21 MR. VESPER: Excuse me, I'm making that request.

22 THE COURT: What?

23 MR. HERMESMANN: I don't mind that language, as just  
24 suggested by Mr. Vesper. The language that he just suggested,  
25 which I think is pretty much the same as you've just indicated

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1 is fine.

2 THE COURT: What, "to include?" I'm sorry.

3 MR. HERMESMANN: To include but not limited to.

4 THE COURT: You don't mind.

5 MR. HERMESMANN: No.

6 THE COURT: I didn't think so.

7 MR. VESPER: Right.

8 THE COURT: All right. And now, in the next  
9 paragraph, which is 14, I have the following changes: In the  
10 one, two, three, fourth line down, after the word, "who," have  
11 the phrase, "have been invited upon," or "have the right to be  
12 on the premises."

13 See that?

14 MR. HERMESMANN: I do.

15 THE COURT: Okay. And then after the word,  
16 "premises," which is Line 4, I have a new sentence which reads  
17 as follows: "A person who enters the premises to purchase  
18 goods or services from the owner or operator is deemed to have  
19 been invited on to the property."

20 MR. HERMESMANN: And I believe that is language that  
21 would be more appropriate for a premises liability case as to  
22 this case.

23 THE COURT: Okay. Well, you can say -- that's -- you  
24 objected, but I'm going to add that.

25 MR. HERMESMANN: Thank you.

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1 THE COURT: I think we have that -- still have the  
2 concept of a business invitee. Okay.

3 Believe it or not, I have nothing on Page 15. In 16,  
4 we changed -- in B, second paragraph, second line of B, we  
5 changed the word, "the" to "a."

6 MR. HERMESMANN: No objection.

7 THE COURT: And I think that was Mr. Vesper's  
8 suggestion.

9 MR. VESPER: Yes, Your Honor.

10 THE COURT: Okay. That's the only change I have on  
11 Page 16.

12 On Page 17, there will be a new paragraph between 15  
13 and 16. I'm trying to figure out where that is now. Have I  
14 lost it already?

15 Oh, it's a sanitary code language.

16 MR. VESPER: Right, the sanitary.

17 THE COURT: Why don't I have my copy? Oh, I have it,  
18 I do have it. Okay.

19 Basically, we took out -- we took -- well, I'll just  
20 read it: The defendant, Pine Haven Campground, is a private  
21 camping resort. As such, it is subject to Chapter 9 of the  
22 New Jersey State Sanitary Code entitled: Public Recreational  
23 Bathing. Pine Haven is not required by the statute to have  
24 lifeguards or first aid personnel in and around the man-made  
25 swimming lake. They are required, under the statute, to post



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1 signs that state no lifeguard on duty. Persons under the age  
2 of 16 must be accompanied by an adult and no swimming alone.  
3 In this case, Pine Haven alleges that it complied with the  
4 requirements of the New Jersey Sanitary Code, and appropriate  
5 signs were displayed at the lake. Plaintiff alleges that Pine  
6 Haven did not display appropriate signs at the lake and  
7 negligently failed to manage its facilities and enforce its  
8 own safety rules and regulations. Whether in compliance with  
9 the sanitary code -- with the New Jersey Sanitary Code by Pine  
10 Haven amounts to reasonable care in the operation of the  
11 swimming lake, must be determined by the jury based on all the  
12 evidence. You may, but are not required to consider that  
13 compliance with the sanitary code amounts to reasonable care.

14 I hear dead -- deadly silence.

15 MR. HERMESMANN: No objection from the defense.

16 THE COURT: Any objection?

17 MR. VESPER: No, Your Honor.

18 THE COURT: Okay. I thought you all had agreed to  
19 this already. Okay. Let me attach this so I don't lose it.

20 Again, that's going to be what is 15 -- what is  
21 currently 15 and 16. Okay.

22 Nothing else on Page 17. I have nothing on 18.

23 On 19: 1, survivorship is going to be divided into A  
24 and B.

25 Do we have 1.7, Sanhita?

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1 Oh, no, that's the charge. That's what you're going to  
2 get me.

3 MR. VESPER: Yes, Your Honor.

4 THE COURT: Okay. Well, we're going to change the A.  
5 We're going to change, "pain, comma, suffering, fear and  
6 anxiety," there's only two. Adding "fear and anxiety," and  
7 then we're going to add that charge that's required in rule --  
8 I think it's 1.7 B.

9 MR. VESPER: 1.71B.

10 THE COURT: 1B is in the New Jersey rules. I'm  
11 hoping you guys, before you leave here today, will get me  
12 that.

13 MR. HERMESMANN: My objection to adding "fear and  
14 anxiety" in the --

15 THE COURT: I know.

16 MR. HERMESMANN: I just want to put it on the record.

17 THE COURT: I know.

18 MR. HERMESMANN: Fear and anxiety are a subset of  
19 pain and suffering. It's just more of the same.

20 THE COURT: I understand. Don't agree with you, but  
21 I understand, which is something. Okay.

22 On Page 20, I have -- in the very first, where it says,  
23 "what is reasonable." Do you see that?

24 At the very bottom, the paragraph on the bottom, "what  
25 is reasonable." Do you see that?

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1 MR. HERMESMANN: "What is recoverable?"

2 THE COURT: "What is recoverable," of course.

3 The last two words of the first line, I'm taking out.

4 MR. VESPER: Where?

5 THE COURT: Okay. In A, I'm taking out the words,  
6 "with regard to the decedent's earnings," and replacing it  
7 with, "in determining the amount of moneys the decedent would  
8 have contributed to his mother," and then pick up with, "you  
9 should consider." Okay?

10 MR. HERMESMANN: No objection, Your Honor.

11 THE COURT: That's Page 20.

12 Page 21 on Line 2, we're taking out the, "her," where  
13 it says his/her. Right?

14 MR. HERMESMANN: I'm not sure where you are, Judge.

15 THE COURT: Second line of Page 21.

16 MR. HERMESMANN: Yes, correct.

17 THE COURT: Very -- the end of Line 2. I have no  
18 other changes on 21.

19 MR. VESPER: We had an objection to that on 21, but I  
20 was going to go over --

21 THE COURT: Okay. Well, you do, I'll give your  
22 objection later.

23 MR. VESPER: Okay. Thank you.

24 THE COURT: Okay. On 22, we may get objections here,  
25 in the second full -- the second paragraph, Line 4, starting

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1 with the sentence that begins on Line 4 with the word,  
2 "companionship."

3 MR. VESPER: Yes.

4 THE COURT: Companionship in this sense, however,  
5 will not include true nursing services unless you find that  
6 the decedent had or was likely to have special training.

7 No testimony about specialized nursing training, and  
8 I'm taking that out.

9 Nothing else on 22. 23, I have nothing. 24, I have  
10 nothing. 25, I have nothing. 26, I'm taking out, "funeral  
11 expenses," which begins at the very bottom of 26 and goes over  
12 to the top of Page 27. Okay?

13 MR. VESPER: Yes, Your Honor.

14 THE COURT: And on duty to deliberate, I have -- what  
15 insert is that? Oh, that's where -- that's the part where I'm  
16 going to explain to the jury the verdict sheet, okay? And I  
17 think that's it.

18 So now I'm going to start.

19 Oh, yes. What do you want? Do you want to elect the  
20 foreperson or do you want to choose Juror No. 1?

21 MR. VESPER: Yeah, I would just go with No. 1 is  
22 No. 1.

23 THE COURT: Is that okay with you?

24 MR. HERMESMANN: That sounds fine, Your Honor.

25 THE COURT: Okay, then, you know, we have the same as

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1 the other one. We will clean that up. Okay.

2 Now, I'm going to start with Mr. Vesper.

3 MR. VESPER: Your Honor, just to go very quickly, we  
4 appreciate --

5 THE COURT: These are the things you object to.

6 MR. VESPER: Yes. We went through two-and-a-half  
7 hours of this, and I would go first to Page 13.

8 I requested that some language be put in about net  
9 opinion because I believe -- except, I believe, of all the  
10 experts, Doctor -- or Professor Rubin and Dr. Manion gave net  
11 baseless opinions, but Your Honor overruled me on that.

12 No. 14 --

13 THE COURT: Page 14?

14 MR. VESPER: Yes, excuse me, Page 14, I requested the  
15 instruction on duty that can be voluntarily assumed, which is  
16 5:5.10 -- 5 point something.

17 THE COURT: Yeah, you gave me -- you actually gave it  
18 to me.

19 MR. VESPER: Of the model.

20 MR. CICCOTTA: 5.10C.

21 MR. VESPER: 5.10C and.

22 THE COURT: You gave me two alternates, in fact on  
23 requested --

24 MR. VESPER: Yes. And that was overruled, but I do  
25 believe that there were several duties undertaken by Pine

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1 Haven, not the least of which is the roving patrols, among  
2 other things.

3 Then page -- but you overruled that. Page 15 -- well,  
4 if you didn't put it on Page 14, you certainly weren't going  
5 to put the duty voluntarily assumed --

6 THE COURT: On 15.

7 MR. VESPER: -- on Page 15. Then page going -- I  
8 objected on Page 17, where you're adding, "New Jersey State  
9 Sanitary Code," because I don't think the sanitary code is any  
10 part of what is their responsibility, other than it's a  
11 minimum requirement. But Your Honor decided you would --

12 THE COURT: Well, I mean, I agreed with you that  
13 standing by itself --

14 MR. VESPER: Right.

15 THE COURT: -- was a problem, only because the jury  
16 might conclude, well, they complied with the code, therefore  
17 that's okay.

18 MR. VESPER: Right.

19 THE COURT: That's why I insisted on adding the  
20 language that -- it may or may not be reasonable care. But I  
21 have your objection.

22 MR. VESPER: Thank you. And then -- well, we asked  
23 for on Page 19, fear, anxiety and --

24 THE COURT: Distress.

25 MR. VESPER: -- and distress.

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1 THE COURT: I gave you, "fear, anxiety," but not  
2 distress.

3 MR. VESPER: Two out of three, but I still think this  
4 is a serious enough matter where a drowning death as with the  
5 torturous death by fire, when somebody drowns and they're in  
6 distress, they -- it's a completely different emotion than --  
7 I'm not talking now about the physical pain of it, I'm talking  
8 about the sense of dread and distress. Well, dread is more  
9 like fear.

10 THE COURT: Yeah, that's what I was --

11 MR. VESPER: Anyway, I thought there was a  
12 distinction, Your Honor didn't agree. Moving right along.  
13 Did I miss something?

14 On Page 21, my co-counsel wants to add --

15 THE COURT: Page 21?

16 MR. VESPER: Page 21. We had requested -- my  
17 co-counsel and I, that additional language to the wrongful  
18 death charge 5.40C be added, which we drafted last night and  
19 that was part of my special jury instructions, that was  
20 actually just one sentence, but that Your Honor overruled. Is  
21 that it?

22 MR. CICCOTTA: Yes.

23 MR. VESPER: And I believe -- yeah, we're going to  
24 talk about the verdict sheet later. That's when we --

25 THE COURT: Yes, we will go right to the verdict

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1 sheet after.

2 MR. VESPER: Do you want me to go to the verdict  
3 sheet now?

4 THE COURT: No, no. I'll go through it first, and  
5 then --

6 MR. HERMESMANN: Your Honor, briefly, on Section 13,  
7 which was Page 14 --

8 THE COURT: Page 14?

9 MR. HERMESMANN: My request in chambers, which I'll  
10 repeat here to make a fully balanced charge would be that it  
11 read on the second paragraph, under Section 13: Defendants  
12 deny any negligence with regard to the operation and  
13 maintenance of the swimming lake where John Toribio drowned,  
14 stating that the industry standard for swimming lakes does not  
15 require illumination of the lake. Patrolling is not required  
16 and that neither of these issues were a cause of the accident.  
17 Defendants also assert that proper signs were in place, and --  
18 and then pick up from there.

19 Moving forward to Page 21. And the section is: What  
20 is coverable, at the end of Section A, we requested that we  
21 include the language: Ultimately, you must determine what  
22 amount of money he reasonably would have provided to Betania  
23 Toribio. Your Honor did put in language at the beginning of  
24 that which adequately addressed our concern.

25 Other than that, I have no additional comment.



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1 THE COURT: All right. If you'll now turn to the  
2 verdict sheet. Okay?

3 I'll tell you what I think we've agreed to, and then  
4 you can give me yours. Okay.

5 In Paragraph 1, I call it Question 1, we're going to  
6 separate the question about negligence and the question about  
7 proximate cause. It's going to be two questions.

8 I'm sorry, are you okay? You with me?

9 MR. HERMESMANN: No, I'm fine, I'm listening.

10 THE COURT: No, I saw you go under the table, I was  
11 wondering what was going on.

12 MR. VESPER: We had -- neither of us had any  
13 objection to that.

14 THE COURT: I know, that's why I didn't think so.

15 So 1 becomes 1 and 2, basically. 3 and 4 is the same  
16 concept, except, of course, the different party with a burden  
17 of proof, but the concept is the same, negligence on the one  
18 hand and proximate cause on the other. Okay? That will be 3  
19 and 4. Okay?

20 MR. VESPER: Yes, Your Honor.

21 MR. HERMESMANN: Yes, Your Honor, I'm sorry.

22 THE COURT: 5, I have no changes, except the number  
23 is going to be -- instead of 3, it's 5.

24 MR. VESPER: Right.

25 THE COURT: 6, I've added the word, "conscious" and

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1 pain and suffering, fear and anxiety.

2 MR. HERMESMANN: And the defense position is that it  
3 should just be pain and suffering. Those other --

4 THE COURT: Right.

5 MR. HERMESMANN: -- descriptors.

6 THE COURT: Right. And his position, to make -- the  
7 other side, is it should include distress.

8 MR. VESPER: Right.

9 MR. HERMESMANN: Those other wordings are just  
10 subsets of pain and suffering.

11 Your Honor, if I could, going back to what's now  
12 Question No. 5 --

13 THE COURT: Yes.

14 MR. HERMESMANN: The jury will need an instruction at  
15 the end of that question, that they should only proceed to the  
16 next question if they find the defendant's 50 percent or more  
17 at fault.

18 MR. VESPER: May I suggest? I don't think they need  
19 that for this reason. Even if, even if, their numbers are,  
20 let's assume unfavorable.

21 THE COURT: It's 55/45. 55 for the plaintiff and 45  
22 for the defendant.

23 MR. HERMESMANN: Let's assume -- then there is no  
24 recovery for the plaintiff.

25 MR. VESPER: Respectfully, I think they should

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1 proceed to give us a number for this reason: I believe the  
2 cases say, I can't cite right now to a case, but the cases say  
3 that in some situations, it's up to the trial Judge that the  
4 jury can proceed to evaluate a claim, even though technically,  
5 Your Honor is going to mold the verdict and come up with a  
6 zero. If their percentage is 51 percent comparative against  
7 John, why shouldn't they proceed to give us the value of the  
8 damages, even though John is never going to collect them, if,  
9 perhaps, that would assist the Third Circuit or who's ever  
10 going to review this.

11 MR. HERMESMANN: Judge, I've never seen a situation  
12 where a jury reaches a verdict on liability, and then for some  
13 unknown reason, which I've never even heard the argument made,  
14 would then proceed on to damages.

15 If they reach a verdict in favor of the defense, they  
16 need to be instructed at the end of that questioning, cease  
17 your deliberations, you're done.

18 THE COURT: I agree with the defendant on that one, I  
19 really do.

20 MR. VESPER: All right.

21 THE COURT: I'm going to add: If you find more than  
22 50 percent. All right.

23 Now, on 6, I have fear and anxiety and conscious, and  
24 we've already argued that, so we don't have to argue it again.

25 Okay. 7, I'm adding -- I'm only -- on 7, I'm going to

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1 make, which is now 5, it becomes 7, there's only going to be  
2 an A and B, C and D go out, but I'm going to add to both A and  
3 B the words at the end, "and in the future." Okay?

4 MR. VESPER: So A and B is going to be -- A is going  
5 to be financial contributions to date and in the future, and  
6 then B is going to be the other one?

7 THE COURT: Yep.

8 MR. VESPER: All right. Very well, Your Honor.

9 THE COURT: Okay.

10 MR. HERMESMANN: And the defense position, Your  
11 Honor, as stated in chambers, is that all damages under the  
12 Wrongful Death Act should be on a single line and not broken  
13 down, that the breakdown that's required by law is one for  
14 Survivors Act, one for the wrongful death statute and that's  
15 been done. This is just a further breakdown, which is not  
16 required and necessary.

17 THE COURT: I'm going to overrule that. I'm going to  
18 do it the way I'm doing it here.

19 MR. VESPER: Yeah, and I think the case law supports  
20 what Your Honor is doing.

21 THE COURT: Doesn't make a difference. That's what  
22 I'm ruling.

23 MR. VESPER: It's case-specific, yes.

24 THE COURT: I'm ruling.

25 Okay. That's what I have.

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1 Now, I'm going to back to chambers -- Mr. Vesper, I  
2 don't want to cut you off. Is there anything else you object  
3 to here?

4 MR. VESPER: No, Your Honor, thank you.

5 THE COURT: I would appreciate if you could work on  
6 that 1.71(b) charge.

7 MR. VESPER: He's writing it out. My co-counsel is  
8 writing it out as we speak.

9 MR. CICCOTTA: We'll do that right now.

10 THE COURT: By the way, he said he thought you could  
11 reach agreement.

12 MR. CICCOTTA: Believe it or not.

13 THE COURT: What can I say? So -- okay. And I  
14 emphasize, you get here -- I don't know what kind of --

15 MR. VESPER: I beat you this morning.

16 THE COURT: What?

17 MR. VESPER: It's the only time in history that I  
18 think -- your court attendant would bear me out, I actually  
19 beat you in this morning. I have a witness.

20 THE COURT: How do you know you beat me in? Did he  
21 squeal?

22 THE DEPUTY CLERK: I think because he was knocking on  
23 the door looking for you and you weren't here.

24 THE COURT: I was pretty early today.

25 MR. VESPER: You were, you were on my heels.

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1 THE COURT: Yeah, I was pretty early, but -- I try to  
2 leave the house between 6:30 and quarter of 7, and it takes  
3 about an hour to get here. Okay.

4 MR. VESPER: Thank you, Your Honor.

5 THE COURT: Go to work. I'll be inside and you can  
6 barge in and give me your language.

7 MR. VESPER: Thank you, Your Honor. See you  
8 tomorrow.

9 (4:06 p.m.)

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